89-112
No. _____

In The

Supreme Court of the United States

October Term, 1988

MARC L. GOLDSTEIN,

Petitioner,

v.

THE STATE BAR OF CALIFORNIA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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QUESTION PRESENTED

Whether the Supreme Court of California denied petitioner procedural due process of law guaranteed by the Fourteenth Amendment to the United States Constitution when it revoked petitioner's license to practice law without affording him any opportunity to be heard on the vital issue of whether his alleged misconduct warranted the Draconian penalty of license revocation.

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Petitioner Marc L. Goldstein respectfully prays the Court to issue a writ of certiorari to review the judgment and decision of the California Supreme Court filed January 26, 1989.

OPINIONS BELOW

The opinion of the Supreme Court of the State of California is reported at 47 Cal. 3d 937 and is set forth at App. 1-21. The opinion of the Review Department of the State Bar Court filed March 7, 1988, is set forth at App.

22-26. The opinion of the Hearing Panel of the State Bar Court filed August 13, 1987 is set forth at App. 27-40.

JURISDICTION

The decision and judgment of the California Supreme Court was filed and entered January 26, 1989. On March 22, 1989, the California Supreme Court denied petitioner's petition for rehearing. A copy of said order is set forth at App. 41. On June 9, 1989, Justice O'Connor extended petitioner's time within which to file this petition for writ of certiorari to and including July 20, 1989. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. section 1257.

Petitioner first raised his claim that the Supreme Court of California denied him procedural due process of law in violation of the federal constitution in his petition for rehearing, stating on the first page that this was "the first opportunity he . . . . had to address the appropriateness of [the Supreme Court's] withdrawing his license to practice law." Petitioner stated that he, as well as the Hearing Panel and Review Department of the California State Bar Court "expected the matter to be re-referred back [to the Hearing Panel] for further hearings as to the extent of and appropriateness of discipline." He pointed to the Hearing Panel's recommendation that in the event the Supreme Court upheld the State Bar's conclusion that petitioner had engaged in misconduct warranting discipline, "the matter be re-referred back to [the] Hearing Panel for a determination as to the level of discipline to be imposed," App. 40, and to the Review Department's

alternative recommendation to the Supreme Court "that the matter be re-referred to the State Bar for a determination of the appropriate discipline to be imposed, the Review Department intending in the event of said order to re-refer the matter to the same Hearing Panel." App. 25.

The Supreme Court did not refer the matter back to the State Bar Court for a determination of the appropriate discipline to be imposed. Instead, after finding that petitioner had engaged in conduct warranting *some* discipline, the Court ordered petitioner's name stricken from the roll of attorneys. App. 21. The Court imposed this Draconian penalty, even as it recognized that petitioner committed no act of misconduct during the three years he was a member of the California Bar, App. 20, and even as it recognized that petitioner's misconduct was relatively minor: "The effect of petitioner's misdeeds was that he was able to prematurely apply for admission to the Bar and to be admitted without adequate consideration of his moral character." App. 20.

In his petition for rehearing, petitioner argued that the Supreme Court had denied him procedural due process in violation of the federal constitution when it stripped him of his license to practice law without giving him an opportunity to present evidence that he is a person of good moral character, qualified to practice law.[1]

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[1] While petitioner does not here challenge the Supreme Court's conclusion that he engaged in misconduct warranting discipline, he still believes he is innocent of all wrongdoing. *See Hightower v. State Bar*, 34 Cal. 3d 150, 157 (1983). ("We . . .

(Continued on following page)

Under the circumstances, petitioner raised his federal constitutional question in timely fashion. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680 (1930) ("The federal guarantee of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government."). *See, Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964).

CONSTITUTIONAL PROVISION

The Fourteenth Amendment to the United States Constitution provides in relevant part that "no state shall . . . deprive any person of . . . liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Petitioner is a 35 year old married man who has practiced law without incident or complaint in Kansas and California since 1981. Petitioner was first admitted to the State Bar of Kansas in May 1981 and in California in December of 1985.

(Continued from previous page)

question the wisdom of denying an applicant admission to the bar if that denial rests on the applicant's choosing to assert his innocence regarding prior charges rather than to acquiesce in a pragmatic confession of guilt. . . .")

In February 1979, petitioner took and passed the California Bar Examination. His certificate of admission, however, was delayed pending a moral character investigation which dealt primarily with his involvement in extensive litigation as a plaintiff during the early to mid-1970's. In November 1982 the Committee of Bar Examiners recommended that petitioner's certificate for admission be denied on the ground that he did not possess the requisite moral character. The Committee further ruled that the period when another application might be filed was extended to three years from the date of denial of the application.[2] Petitioner unsuccessfully sought review of the ruling from the Supreme Court. App. 30. The 1982 proceeding is not involved in this case.

A. Petitioner's Application to Take the Bar Examination, Prior to November, 1985.

By letter dated January 8, 1985, petitioner requested and received from the Committee of Bar Examiners an application form to take the February 1985 Bar Examination, which he failed. He subsequently applied to take the July 1985 examination, which he passed. The California State Bar recommended that petitioner be certified for admission to the Bar, and he was admitted to practice on December 10, 1985. Thus, petitioner was admitted to the California Bar more than three years following the prior denial of the Committee of Bar Examiners.

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[2] The Hearing Panel stated that the actual date the prohibition expired was November 1985, and that "the earliest date arguably possible was . . . July 1985." App. 33.

B. The State Bar's Motion to Strike Petitioner's Name from the Role of Attorneys.

On February 13, 1986, the Committee of Bar Examiners moved the Supreme Court to delete petitioner's name from the list of attorneys admitted to practice law in California, alleging that due to an error made by its staff, the State Bar erroneously certified that petitioner was eligible for admission to practice law. The State Bar explained that its clerical staff failed to notice that petitioner had been the subject of moral character proceedings following the 1979 examination, and that he was precluded from reapplying for admission for three years from the date of denial of the application. Elaborating, the State Bar said that as a result of the staff error petitioner's application to take the Bar Examination was not forwarded to the Executive Director for investigation of his moral character.

On March 12, 1986, the Supreme Court denied the State Bar's motion to strike petitioner's name without prejudice and, citing *Stratmore v. State Bar*, 14 Cal. 3d 887, 890 (1975), referred the matter to the State Bar for "hearing, report and recommendation as to whether [petitioner] has committed misconduct warranting discipline." App. 29.[3]

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[3] In *Stratmore* the Court concluded that it had authority to discipline Mr. Stratmore for his pre-admission conduct and suspended him for nine months, instead of revoking his license. 14 Cal. 3d at 891.

C. Proceedings in the State Bar Court.

The Hearing Panel of the State Bar Court conducted petitioner's hearing on July 8 and 9, 1987. Prior to the commencement of the hearings, two important events occurred.

In February 1987, after taking petitioner's deposition and engaging in extensive discovery, Thomas Kelley, Examiner for the State Bar, proposed, following a mandatory settlement conference, and subject to State Bar approval, to dispose of the proceedings against petitioner by placing him on probation for one year, and by suspending him for one year, which suspension would be stayed. As part of the proposed settlement the State Bar would agree that it had examined petitioner's application for admission to the Bar and found no objection thereto, and that the State Bar had no criticism of the application procedure followed by petitioner, other than his applying prematurely without specifically stating on his application form that he had been the subject of a prior moral character proceeding. Petitioner rejected this proposal, because he did not believe he had engaged in any misconduct warranting discipline.

Prior to the settlement proposal, and in September 1986, the parties agreed that the hearing would proceed solely on the issue of whether petitioner had engaged in misconduct warranting discipline when he applied for admission to take the Bar Examination without affirmatively stating on the application that he had been the subject of a prior moral character proceeding. The stipulation implicitly provided that the appropriate discipline,

if any, would be decided in a subsequent proceeding.[4] In accordance with this understanding the Hearing Panel, after concluding that petitioner had engaged in misconduct warranting discipline, recommended "to the Supreme Court that the matter be re-referred back to [the same] Hearing Panel for a determination as to the level of discipline to be imposed." App. 40.

Before the Hearing Panel, petitioner insisted that he had engaged in no misconduct warranting discipline. He testified that he believed the Committee's order restricted him from becoming a lawyer for three years, but did not restrict him from merely taking the Bar Examination, which he was required to take a second time, especially since petitioner knew, that mere passage of the Bar Examination would not automatically insure him admission. He testified that he had correctly answered all the questions on his application form, that he would have had no motive to conceal his prior moral character hearing from the Committee of Bar Examiners, and that he believed that the Committee had this information at its fingertips (through its computer).[5] He noted that he applied in his own name, provided his Social Security Number and

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[4] Paragraph 6 of the stipulation provides: "There is no stipulation that a finding that [petitioner] engaged in the conduct . . . must necessarily result in the imposition of discipline upon [petitioner] based thereon."

[5] Petitioner's assumption was correct. Mr. Rodriguez, the State Bar's analyst who conducted petitioner's moral character review, testified that upon punching up petitioner's name on the computer he saw a "hold code," which he removed, thereby permitting petitioner's application to proceed without additional scrutiny.

Driver's License Number, referenced his 1979 application, and provided fingerprints and a photograph. This information in fact did match petitioner with his prior moral character hearing, and petitioner's application would have been referred to the proper party in the State Bar for appropriate scrutiny but for the error of Mr. Rodriguez, a Committee employee.[6] Moreover, petitioner testified that he had informed Rodriguez of the former moral character hearing. App. 32.[7]

In further support of his contention that he was not trying to conceal his 1982 moral character proceedings from the Committee of Bar Examiners, petitioner testified, without contradiction, "that when Connie Villalobos, a moral character analyst employed by the Committee, requested a copy of his 1979 application, he told her to contact John Fry, the Examiner in his moral character proceeding." App. 12. The State Bar did not call its own employee to contradict petitioner's sworn testimony. App. 12.

In sum, petitioner contended that he had no intent to conceal from the State Bar the fact that it had conducted a moral character proceeding against him; that he had

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[6] The Supreme Court noted that the State Bar conceded at oral argument that it "had been negligent in processing petitioner's application." App. 13.

[7] The Hearing Panel found, contrary to petitioner's uncontradicted testimony, that petitioner was aware that Rodriguez was not aware of the prior moral character hearing, but the Review Department deleted this portion of the Hearing Panel's findings. App. 13 n.7. The Supreme Court did not think it necessary to determine whether petitioner had in fact informed Rodriguez of the prior moral character hearing. *Ibid.*

informed two State Bar employees that he had been the subject of such a proceeding; that he had no intent to deceive the State Bar; and that he could not have foreseen that the Committee would fail to match up his 1985 application to take the Bar Examination with his prior moral character proceeding. In essence, he argued that the Committee's negligence in handling his application should not have been imputed to him, nor should he have been disciplined for their errors (App. 13) – especially given the absence of any motive to conceal facts from the Committee. Petitioner's submissions were rejected by both the State Bar Court and the Supreme Court, and petitioner, while denying all wrongdoing, does not here challenge their conclusion that he engaged in misconduct warranting discipline.[8]

Petitioner's challenge here is that he was denied due process because he was given no opportunity to be heard on the issue of the appropriate discipline to be imposed for his alleged misconduct, and the punishment imposed on him – revocation of his license – is out of all proportion to his alleged misconduct.

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[8] *See* fn 1, *supra* 3.

REASONS FOR GRANTING THE WRIT

THE SUPREME COURT OF CALIFORNIA DENIED PETITIONER PROCEDURAL DUE PROCESS OF LAW GUARANTEED BY THE FOURTEENTH AMENDMENT WHEN IT REVOKED PETITIONER'S LICENSE WITHOUT AFFORDING HIM ANY OPPORTUNITY TO BE HEARD ON THE VITAL ISSUE OF WHETHER HIS ALLEGED MISCONDUCT WARRANTED STRIPPING HIM OF HIS RIGHT TO PRACTICE LAW.

Petitioner was stripped of his right to practice law in California without ever having been given an opportunity to be heard on the question of whether his misconduct warranted such a Draconian penalty. As already noted, the Hearing Panel of the State Bar Court decided only that petitioner committed acts warranting discipline, and recommended to the Supreme Court that the matter be referred back to the same Hearing Panel for a determination as to the appropriate discipline to be imposed. The question of the appropriate discipline to be imposed was deliberately not discussed in the proceedings before the Hearing Panel or the Review Department of the State Bar Court, since the parties agreed to afford petitioner a hearing for that very purpose in the event there was a finding of misconduct.

When petitioner filed his petition for review in the Supreme Court of California, challenging the State Bar Court's conclusion that he had engaged in misconduct, he assumed that if the Court concluded that he had engaged in misconduct warranting discipline it would refer the matter back to the Hearing Panel for its recommendation into the appropriate level of discipline. Accordingly, petitioner did not discuss the question of the appropriate

discipline in his brief in support of his petition for review or in his reply brief.

In his petition for rehearing he did argue, vigorously, that it was unfair and a denial of due process to revoke his license without giving him a full and fair opportunity to be heard on the issue of whether his license should be revoked.[9] Petitioner asserted that his alleged misconduct was at most minor, and did not warrant the extreme penalty of license revocation. Moreover, he contended that there were important mitigating circumstances, which would warrant probation rather than license revocation, and that he had never had an opportunity to present these matters to either the State Bar Court or the Supreme Court.

Petitioner argued that his failure to state in his application that he had been the subject of a prior character proceeding should not have been treated as a serious matter since he gave this information orally to two responsible State Bar employees. When Connie Villalobos, a moral character analyst employed by the Committee, requested a copy of petitioner's 1979 application, he told her to contact John Fry, "the Examiner in his moral character proceeding." App. 12. The Supreme Court was required to accept petitioner's testimony as

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[9] The Supreme Court is supposed to exercise its independent judgment in determining the appropriate punishment. Gordon v. State Bar, 31 Cal. 3d 748, 757 (1982). In this case the Supreme Court was in no position to exercise this independent judgment, since no record concerning discipline had been made in the State Bar Court.

true, at least for the purpose of determining the appropriate punishment. See *Galardi v. State Bar,* 43 Cal. 3d 683, 689 (1987). Instead the Court treated petitioner's testimony as "suspect" because he did not again refer to the moral character proceeding when he wrote to Ms. Villalobos. The Court assumed that if petitioner had in fact told Villalobos to contact John Fry, "petitioner's character hearings would have been discovered." App. 12. Additionally, the Court stated that "assuming that petitioner did in fact tell Villalobos to contact Fry, that did not relieve him of the obligation of disclosing the character hearing on his application form." *Id.* at 12-13. Maybe so, but surely it would be an important mitigating circumstance.

Petitioner also called the Supreme Court's attention to the fact that he had discussed his morals proceeding with Mr. Rodriguez, "the State Bar's analyst who conducted petitioner's moral character review." App. 18-19. Petitioner testified he had several telephone conversations with Mr. Rodriguez in 1985 during which "he informed Rodriguez of the former moral character hearing." App. 32.[10] The Hearing Panel however found that petitioner did not tell Rodriguez there had been a prior moral character hearing, App. 32. To prove that he had in fact fully disclosed to Rodriguez the prior moral character hearing, petitioner attempted to obtain a tape

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[10] The Supreme Court ignored this testimony, and referred instead to petitioner's testimony that he told Rodriguez "he did not wish to go through 'a moral character hearing' or 'another moral character hearing.' " App. 19. Significantly, the notes Rodriguez made of his telephone conversations with petitioner were mysteriously lost or destroyed.

recorded interview conducted by the State Bar Executive Director with Rodriguez. The tape was made in the course of an investigation to determine why Rodriguez did not refer petitioner's application to the proper party in the State Bar for appropriate scrutiny.[11] The tape was made at a time most contemporaneous with the events, and would have supported petitioner's testimony that he had in fact informed Rodriguez of the prior moral character proceeding. The State Bar Court denied discovery on the ground that the tape recording was privileged. The Supreme Court refused to consider the correctness of this ruling, stating that "the Hearing Panel and Review Department, while specifically concluding that petitioner did not tell the analyst there had been a prior moral character hearing," also "found that [Rodriguez'] memory was faulty." App. 20. Accordingly, the Supreme Court stated, "even if the tape recording would have supported petitioner's account of his conversations with [Rodriguez], our conclusion that petitioner committed acts of misconduct would remain unaltered." App. 20. But if the tape recording showed that petitioner fully advised Rodriguez about the prior moral character proceeding, that surely would be a significant mitigating factor, arguing against license revocation.

Petitioner attempted unsuccessfully to obtain from the State Bar confidential questionnaires submitted by three attorneys whose names petitioner had provided as character references. Petitioner knew they had participated in the prior moral character proceeding and

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[11] Rodriguez testified in the Hearing Panel that he was reprimanded for his negligence.

assumed their questionnaires would have placed the Bar on notice that petitioner had been the subject of previous hearings into his character. App. 18. The Supreme Court did not rule on the correctness of the State Bar Court's refusal to make the questionnaires available, stating "even assuming the questionnaires contained such information, the State Bar's failure to note" the reference to the earlier State Bar morals proceeding did not "relieve petitioner of responsibility for his own misconduct in the matter." App. 18. But if petitioner gave as references three attorneys who knew of his moral character proceeding, expecting them to discuss it in their questionnaires, that would be an important mitigating circumstance, arguing against license revocation.

Petitioner called the Court's attention to *Stratmore v. State Bar*, 14 Cal. 3d 985 (1975), the case cited by the Court when it denied the State Bar's motion to strike petitioner's name from the roll of attorneys. *Supra*, 12. In *Stratmore* the Court did not revoke the attorney's license but instead imposed a 9-month suspension, for conduct much more serious than petitioner's. Petitioner also called the Court's attention to two recent cases: in one the Court imposed a two-year suspension against an attorney for having planned and solicited the murder of a former client, *In re Paul I. Mostman*, 47 Cal. 3d 725 (1989); in the other the Court imposed an 18-month suspension on an attorney for having misappropriated client trust funds, failing to make restitution, and for having fabricated and misrepresented facts to the Review Department of the State Bar Court during the disciplinary case. *State Bar v. Boehme*, 47 Cal. 3d 448 (1988). In both of these cases individuals were given a hearing on the issue of the

extent of discipline to be imposed and were afforded an opportunity to present evidence on that issue. By contrast, petitioner was clearly denied that opportunity: this is akin to dispensing with the "penalty" phase of a trial upon the finding of "guilt."

Finally, petitioner called the Court's attention to the State Bar Examiner's proposal that petitioner accept a suspended one-year suspension for his misconduct. While this offer, of course, was not binding it reflects the judgment of the Examiner that petitioner's misconduct was not so serious as to justify license revocation.

For all these reasons petitioner urged rehearing stating that he "was never permitted an opportunity to submit evidence on the question of appropriateness of discipline, nor to brief the point," and that he had justifiably relied on the recommendation of the Hearing Panel that the case would be re-referred back for further hearings to determine the extent of discipline, if there was an ultimate finding of misconduct. The Supreme Court denied the petition for rehearing, and in doing so denied petitioner due process of law in violation of the Fourteenth Amendment.

Revocation of a license to practice law, designed to protect the public interest, is, like disbarment, "a punishment or penalty imposed on the lawyer." *In re Ruffalo*, 390 U.S. 544, 550 (1968). *See, Ex parte Garland*, 4 Wall. 333, 380 (1866); *Spevack v. Kline*, 385 U.S. 511, 515 (1967). Because the right to practice law is a "liberty" and "property" within the meaning of the Fourteenth Amendment, petitioner was entitled to a due process hearing, which includes a fair opportunity to be heard on the appropriate

discipline to be imposed for his alleged misconduct. In *Randall v. Brigham*, 7 Wall. 523, 540 (1868), the Court stated, "notice should be given to the attorney of the charges made and an opportunity afforded him for explanation and defense." In *Selling v. Radford*, 243 U.S. 46, 49 (1917), the Court stated that before it would disbar an attorney from practicing, based upon disbarment by a state court, it would consider "the character of the acts of misconduct and wrong relied upon . . . and the nature of the proof relied upon to establish their existence." "[O]ne of the conditions this Court considers in determining whether disbarment by a state should be followed by disbarment [by this Court] is whether 'the state procedure from want of notice or opportunity to be heard was wanting in due process.' " *In re Ruffalo, supra*, 390 U.S. at 550.

In *Theard v. United States*, 354 U.S. 278 (1957) petitioner's name was stricken from the federal district court's roll of attorneys because of his disbarment by the Supreme Court of Louisiana. The state proceedings established that petitioner was disbarred in 1954 for an action in 1935, although at the time of his wrongful conduct he was concededly in a condition of mental irresponsibility. The proceedings also established that as an active practitioner for 6 years preceeding disbarment, after his recovery, no charge of misconduct or impropriety was brought against him. The Court reversed the order striking his name as an attorney and remanded for disposition in accordance with the standards set forth in *Selling v. Radford, supra*. The *Seiling* standard teaches that a court should not disbar an attorney, or revoke his license, except upon clear proof that under the principles of right

and justice it is constrained to do so. Neither the State Bar Court, nor the California Supreme Court gave petitioner the opportunity, guaranteed by the Fourteenth Amendment to show that his alleged misconduct was not a sufficient basis for revoking his license.

The case raises important questions for the bar, the courts, and the public. The practice of law is a "liberty" and "property" as well as a "privilege" protected by the Privileges and Immunities Clause of Art. IV, section 2 of the United States Constitution. *Supreme Court of N.H. v. Piper*, 470 U.S. 274, 283 (1985). It is important to the national economy, and to the maintenance and well-being of the Union. *Id.* at 281. Because lawyers play an important political, cultural, religious, and civic role, membership in the Bar is burdened with conditions, controlled by the courts. A license to practice law carries with it an implied representation by the court that the person is qualified and of good moral character. Accordingly the court that issues the license has the power to revoke it, to protect the public. But, since stripping a man of his right to practice law is a severe punishment or penalty, the Constitution requires that it be preceded by a due process hearing. See *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 541 (1985). The process "due" an attorney facing license revocation is high. To perform its high function, to minimize "substantially unfair or mistaken deprivations," *Fuentes v. Shevin*, 407 U.S. 67, 97 (1972), "justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133 (1954); *Offutt v. United States*, 348 U.S. 11, 14 (1954).

No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss a

full and fair opportunity to be heard. *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 171-72 (1951) (Frankfurter, J. concurring). Similarly, no better way has been found for generating the feeling, so important to a popular government, that justice has been done." *Id.* at 172.

This case is important because California has denied petitioner Due Process of Law guaranteed by the Fourteenth Amendment, the cornerstone of our democracy. This Court, the guardian of the Constitution, should protect petitioner and thereby protect the Constitution.

CONCLUSION

For the aforesaid reasons, petition for writ of certiorari should be granted.

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C O P Y

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

MARC L. GOLDSTEIN, Petitioner, v. THE STATE BAR OF CALIFORNIA, Respondent.	)	S006541 (Filed Jan. 26, 1989)

BY THE COURT:

On December 10, 1985, this court issued an order admitting a list of persons, including petitioner, to the practice of law in California. On February 13, 1986, the Committee of Bar Examiners moved the court to delete petitioner's name from the list, nunc pro tunc, on the ground that petitioner was ineligible to apply for such admission. In order to obtain further information regarding the circumstances surrounding petitioner's admission, we denied the motion without prejudice and referred the matter to the State Bar "for hearing, report and recommendation as to whether Marc L. Goldstein has committed misconduct warranting discipline."

Following a hearing before the State Bar Court, the hearing panel (one referee) filed an opinion on August 13, 1987, concluding that petitioner committed acts warranting discipline, and recommending that this court refer the matter back to the hearing panel for a determination as to the level of discipline to be imposed. Both petitioner and the State Bar filed requests for review with the Review Department of the State Bar Court.

On February 25, 1988, the review department unanimously determined that petitioner committed misconduct which misled the Committee of Bar Examiners to certify him to practice without a full assessment of his moral character, and recommended that this court either vacate its order admitting petitioner to the practice of law or refer the matter to the State Bar for a determination of the appropriate discipline to be imposed. Petitioner sought review of this determination; we construed the review department's recommendation as a renewal of its motion to delete petitioner's name from the list of those admitted to the State Bar, and issued a writ of review. We now adopt the review department's findings of fact, and order defendant's name stricken from the roll of attorneys.

FACTS

In February 1979, petitioner took and passed the California bar examination. His certificate for admission, however, was delayed pending a moral character investigation. In July 1982, following a lengthy hearing, a hearing panel of the State Bar Court recommended that petitioner's certificate for admission be denied on the ground that he did not possess the requisite moral character. This recommendation was based on findings that petitioner: (1) deliberately abused the judicial process by filing numerous actions to harass tradespeople and others with whom he had petty disputes and to obtain nuisance settlements to which he was not entitled; (2) knowingly made false statements under oath to advance his interests in the course of several of his lawsuits; (3) engaged on several occasions in the unauthorized practice of law; and (4) committed acts of fraud against various entities,

including the filing of a false claim for reimbursement for "lost" money orders which were not in fact lost, making knowingly false statements on an application to practice law in Georgia, filing claims for lost baggage against several airlines which either falsely stated that the baggage was lost or greatly exaggerated the value of the items lost, making false statements on a credit application, and engaging in a check-kiting scheme.

On January 19, 1983, following a further hearing at which petitioner testified, the Committee of Bar Examiners adopted the findings of the hearing panel and denied petitioner certification to practice law in the State of California. The committee further ruled that "[p]ursuant to Rule X, Section 104(a) [of the Rules of the State Bar Regulating Admission to Practice Law in California] the period when another application may be filed is extended to three years from the date of denial of the application."[1] Petitioner unsuccessfully sought review of the ruling from this court, and, through counsel, made unsuccessful written attempts to obtain a waiver of the requirement that he retake the California bar examination.

By a letter dated January 8, 1985, only two years after the ruling of the Committee of Bar Examiners, petitioner

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[1] Although the committee did not make its formal written findings and conclusion until January 19, 1983, it heard the matter on November 19, 1982, and mailed petitioner notice of its intended decision four days later. It is unclear whether the three-year period established by the committee began in November 1982 or January 1983; however, the question does not affect the result in the instant proceeding.

made a written request for an application form to take the February 1985 bar examination. The letter followed a telephone conversation between petitioner and Paula Daniels, employed by the State Bar as an assistant section chief of receipts, the content of which is in dispute. At his request, petitioner was provided with the "attorney-repeater" application packet, and applied for and took the February 1985 bar examination.[2] He failed that examination, and subsequently applied for and took the July 1985 examination. Neither his letter nor his application forms mentioned the hearings into his character or that he had previously been denied certification to practice law. The application forms did mention that he had previously applied to practice law in 1979, and furnished an update of three cases to which petitioner was a party which had not been resolved at the time of his previous application.

Shortly after Petitioner took the July 1985 bar examination, the State Bar requested from him further information regarding the three cases listed on his application, which he provided. In the course of providing this information, he had several telephone conversations with Admissions Analyst Bernardo Rodriguez. The State Bar also requested a copy of his 1979 application to take the bar examination. Petitioner provided a copy of this application; however, the answers to two of the questions on the 1979 form (the questions dealing with accusations of fraud and civil litigation in which he had been involved)

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[2] Petitioner was an attorney licensed to practice law in Kansas, and was a "repeater" because he had previously taken the bar examination.

read, "see attached sheet [information is being compiled and will be mailed in shortly]." (Brackets in original.) The copy of the 1979 application provided by petitioner contained no "attached sheets," and the cover letter he attached made no mention of the inquiry into his character.

Petitioner passed the July 1985 bar examination. The State Bar failed to recognize that there had been previous hearings into his moral character, and routinely recommended that he be certified for admission. Following our order admitting him to practice on December 10, 1985, the State Bar discovered its oversight, and the instant proceedings commenced.

Petitioner contends the recommendation of the review department is unsupported by the evidence, that prejudicial evidence was improperly admitted against him at the hearing, and that the State Bar denied him discovery of relevant and exculpatory evidence. As will be seen, we find each of these claims unmeritorious.

DISCUSSION

I. SUFFICIENCY OF EVIDENCE

We first address petitioner's claim that the evidence does not support the findings of the review department. The State Bar's findings are not binding on this court, and we must independently review the evidence, resolving all reasonable doubts in favor of the attorney. (Segal v. State Bar (1988) 44 Cal.3d 1077, 1081; Galardi v. State Bar (1987) 43 Cal.3d 683, 689; Alberton v. State Bar (1984) 37 Cal.3d 1, 11.) However, we rely heavily on the State Bar's findings, conclusions, and recommendations, and the burden

of proving them unsupported by the evidence lies with petitioner. (Segal v. State Bar, supra, 44 Cal.3d at p. 1081; Galardi v. State Bar, supra, 43 Cal.3d at p. 689; Trousil v. State Bar (1985) 38 Cal.3d 337, 341.)

The review department's findings of misconduct rest upon two grounds. First, the review department found that petitioner acted improperly in applying for readmission prior to the expiration of the three-year period established by the Committee of Bar Examiners in its January 19, 1983, meeting. Second, it found petitioner improperly failed to notify the State Bar of the prior inquiry into his character despite being called upon to do so on his application form. Petitioner challenges each of these conclusions.

A. *Premature Application*

Petitioner concedes the three-year "application" period set by the Committee of Bar Examiners had not yet expired at the time he reapplied to take the bar examination in 1985. However, he argues that applying to take the bar examination and applying for admission to the bar are not one and the same thing, and the committee's order merely barred him from the latter. He claims he was entitled to retake the bar examination so that he could reapply for admission as soon as possible after the expiration of the three-year period. The claim is insupportable.

Rule X, section 104(a) of the State Bar Rules Regulating Admission to Practice Law in California states that "[a]n applicant who has been denied certification for admission to practice law . . . because the applicant has

not proven that he or she is possessed of good moral character may file another application for admission and pay the required fee after the expiration of two (2) years from the date of such denial or such shorter or longer period as may have been set by the committee. . . ." Here the period set by the committee was three years. Petitioner's apparent contention is that the words "application for admission" contained in section 104 has nothing to do with the application to take the bar examination, which he regards as a separate prerequisite to the application for admission. However, no such dichotomy appears in the Rules Regulating Admission to Practice. The application to take the bar examination is inseparable from the application to practice law. Applicants do not file an initial application to take the bar examination, followed by a separate application to practice law; rather, only one application form is filed. That form contains a declaration, which was signed by petitioner, which states in part that "I am the *applicant for admission to practice* referred to." (Emphasis added.) It is thus clear that by sending in his application form petitioner was not merely attempting to retake the bar examination. Rather, he was making a new application for admission, at a time when the Rules Regulating Admission to Practice and the ruling of the Committee of Bar Examiners explicitly barred him from doing so.[3]

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[3] This conclusion is unaltered by the fact that, as noted by petitioner, an applicant need not retake the bar examination if he has passed it within five years of his application. (Rules Regulating Admission to Practice Law, rule XIII, § 131.)

Petitioner further argues that even if his attempt to retake the bar examination was in fact premature, he held a good faith belief that he was entitled to take it when he did. This claim must also be rejected. As noted by the review department, a June 8, 1983, letter written to the State Bar by petitioner's attorney on his behalf recognizes that the committee's order "wishes to exclude my client for an additional three years, plus one year's time necessary to sit for and pass the 1987 Fall Bar Examination." Thus, by his own correspondence with the State Bar, petitioner evidenced a recognition of the fact that the bar examination could not be taken until after the expiration of the three-year period.

Petitioner claims that prior to applying for and taking the bar examination he consulted with Paula Daniels, an assistant section chief of receipts, advised her of the prohibition, and was informed that he could take the exam. Daniels testified that she had no recollection of the call, but had an individual who was the subject of a moral character investigation asked her when he could take the bar examination she would have referred the matter to her superiors. The review department concluded that petitioner did not inform Daniels about his moral character proceedings.

We concur in the finding of the review department. It is highly unlikely that Daniels would have granted the authorization claimed by petitioner, when she was aware that she was not empowered to do so. It is equally unlikely that petitioner would believe he could obtain such authorization from Daniels. All of petitioner's previous written correspondence was either with James B. Tippin, Jr., Executive Director of the Committee of Bar

Examiners, or with various attorneys representing the State Bar, and as the review department stated, it is disingenuous for him to claim he believed he could obtain oral authorization to take the examination from a person in the nonsupervisory position occupied by Daniels. Petitioner has failed to show that the review department's finding is unsupported by the evidence.[4]

B. *Failure to Disclose Character Hearings*

Next, petitioner contests the review department's finding that he improperly failed to disclose the hearings into his character on his application form. The review department concluded he was required to make the disclosure in that section of the application entitled "Civil Cases, Administrative Proceedings," which instructed the applicant to "please state each civil case . . . and administrative proceeding in which you have been involved, or in which you are presently involved." Applicants were cautioned to "[l]ist only new incidents or cases in which there has been a change of status since your previous application." Petitioner made no mention, either here or anywhere else on his application form, of the previous

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[4] Petitioner's letter to the bar following his conversation with Daniels noted that he was a Kansas attorney who had previously taken the California bar examination and then stated, "[i]n speaking with Ms. Paula Daniels of your office today, I am told that I should ask for an 'attorney repeater' packet, in view of my situation." We reject petitioner's contention that the reference to "my situation," which appears to refer to the fact that petitioner is an "attorney repeater," is in any way sufficient to place the bar on notice that it should check its records to see whether there had been inquiries into petitioner's character.

hearings and determination that he should not be certified for admission to the bar.

Petitioner asserts that his moral character proceeding was not a "new incident" and he was therefore not obligated to report it. However, the proceeding was indeed a "new incident," since it had not begun at the time that petitioner filled out his 1979 application form. Moreover, the form required him to report not only new incidents but also cases in which there has been a change of status since his previous application. Even if it could be claimed that the inquiry into his character was not "new," there certainly had been a change of status in that matter since the time of his previous application, which was required to be disclosed. The manifest intent of the form's language was to enable a screener examining both the new and old application forms to obtain a complete picture of all administrative proceedings in which the applicant had been involved. A person examining petitioner's 1979 and 1985 application forms would be unaware that he had been involved in any administrative proceedings relating to his qualifications to practice law. We thus conclude that the language of the application form required petitioner to set forth the details of the hearings into his moral character, and that he improperly failed to do so.[5]

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[5] There are two other places on the application form where petitioner could appropriately have disclosed his character hearings. On page 6 applicants were asked, "[h]ave you, in a judicial or administrative proceeding, ever been charged with or accused of fraud since your last application?", and were told if the answer was "yes" to give details. Petitioner answered "no." Since petitioner's character hearings involved allegations of fraud (which were found true), his answer to this question

(Continued on following page)

Petitioner asserts that proof that the form did not require him to mention the character hearings is found in the fact that following this incident, and apparently because of it, the committee revised its forms to more clearly require such disclosure.[6] He suggests that prior to his own case, the bar did not consider it necessary to obtain information regarding its own proceedings, and that only when the bar discovered that it might overlook these proceedings did it perceive the necessity of asking about them on the application form. However, the revision of the form to more clearly require disclosure of such proceedings does not demonstrate the earlier form's inadequacy for this purpose. The critical question is not why the Committee of Bar Examiners altered its form; it is whether the application as it was worded in 1985 called upon petitioner with reasonable clarity to disclose the

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(Continued from previous page)

also appears to be false. He also might reasonably have disclosed the hearings in the section entitled "Professional Sanctions and Disciplines," which required petitioner to state whether he, "as a member of any profession or organization . . . had any charges or complaints" instituted against him. As pointed out by the review department, petitioner's answer of "no" to this latter question was technically correct, since petitioner was not yet a member of the bar at the time the hearings into his character took place. Nevertheless, the presence of both of these questions on the application form makes it particularly clear that the bar was calling on the applicant to disclose proceedings such as the one in which petitioner was involved somewhere on the form.

[6] This fact was apparently not learned by petitioner until after the completion of the proceedings before the hearing panel. Petitioner's claim that he was wrongfully denied discovery of information pertaining to the revision is discussed, infra.

character hearings. We conclude that it did so, and that petitioner's failure to make such disclosure was willful.

Petitioner claims the designer of the application forms, Mr. Tippin, testified that an applicant's testimony under oath to the committee in a moral character proceeding would constitute a sufficient disclosure of information so that no "update" would be required on a subsequent application. This is a mischaracterization of Mr. Tippin's testimony. The closest he came to such testimony is an affirmative response to a leading question asserting that "the reason for requiring somebody to update the application is if there is anything that is new, having a bearing on the moral character of the applicant. . . ." This in no way suggests that Tippin believed petitioner was not required to disclose the character hearings on his application form.

Petitioner further argues that even if the form did in fact call for disclosure of the hearings, he in good faith did not believe it necessary to do so. In support of this argument he asserts that when Connie Villalobos, a moral character analyst employed by the committee, requested a copy of his 1979 application, he told her to contact John Frye, the examiner in his moral character proceeding. However, Villalobos did not testify at the disciplinary proceedings, and the only evidence that the conversation took place is petitioner's testimony. This testimony is suspect in light of the failure of petitioner's written correspondence to state anything to this effect, and because had he done so, it seems likely that Villalobos would have contacted Frye, with the result that petitioner's character hearings would have been discovered. Even assuming that petitioner did in fact tell Villalobos to contact Frye,

this did not relieve him of the obligation of disclosing the character hearings on his application form, nor does it demonstrate that his failure to do so was in good faith.[7]

Petitioner further claims he held the reasonable and good faith belief that the committee would match his 1985 applications with his moral character proceeding record, that he had no intent to deceive the committee, and could not have foreseen that the committee would fail to match up his new applications to take the bar examination with his prior moral character proceeding. In essence, he argues the State Bar negligently failed to recognize that he had been the subject of previous hearings into his moral character, and that he is being made the scapegoat for their failings.

We are not persuaded. While counsel for the State Bar conceded at oral argument that the bar had been negligent in processing petitioner's application, any inadequacy on the State Bar's part does not absolve petitioner of his own responsibility to bring the prior proceedings to their attention, and to apply for readmission at a time when he was entitled to do so. The argument, moreover, is premised on the theory that petitioner was acting reasonably and in good faith. The review department's finding that the failure to disclose the disciplinary

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[7] Petitioner also attacks the hearing panel's finding that Bernardo Rodriguez, another committee employee, asked him for a copy of his 1979 application, indicating that petitioner was aware that the person processing his application was not aware of his moral character hearing. However, this portion of the hearing panel's findings was deleted by the review department. There is thus no need to address it further.

proceedings on the application form was willful is supported by petitioner's failure to mention them in any of his written communications with the committee, beginning with his request for an application form, and in his omission of the factual information most likely to bring those proceedings to light when he provided the committee with a copy of his 1979 application. We find the review department's findings of misconduct to be amply supported by the evidence.[8]

II. WITHHOLDING EVIDENCE

Petitioner next contends the State Bar concealed from him important evidence prior to the proceedings before the hearing panel. The evidence to which he refers is the fact that subsequent to this incident the State Bar altered its application form so as to more specifically require the disclosure of proceedings such as those in which petitioner was involved. He argues that concealment of this information denied him a fair hearing. He is mistaken.

It is clear that the hearing panel was aware of the change in the form. Indeed, the hearing panel's opinion specifically discusses this fact, stating, "[t]he fact that the Committee may have changed the form does not indicate

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[8] The State Bar also asserts that regardless of whether petitioner accurately answered the questions on the application form, he had an independent affirmative duty to reveal to the committee all matters pertaining to his moral character proceeding. In light of our conclusion that the application form called upon petitioner to disclose the character hearings, and that petitioner committed misconduct by failing to do so, we need not resolve this question.

that . . . disclosure was not required on previous forms." Petitioner stressed the change in the application form in an unsuccessful application for hearing de novo before the hearing panel, and again mentioned it in his request for review by the Review Department of the State Bar. Since the hearing officer and the review department were aware of the change in the form and took it into consideration in their recommendations, any impropriety in the failure to more promptly notify petitioner of the change did not deny him a fair hearing.

In any event, as discussed supra, the fact that the application form may have been subsequently changed has little bearing on the question of whether the form as written reasonably called upon petitioner to disclose the hearings regarding his moral character. Petitioner's contention that this evidence was wrongfully withheld from him must therefore be rejected.

III. ADMISSIBILITY OF EVIDENCE

Petitioner asserts the hearing panel should have sustained his objection to the admission of the decision in his 1982 moral character proceedings. He argues that the decision was irrelevant to the issues in the present proceeding, and was highly prejudicial to him. He relies on Stuart v. State Bar of California (1985) 40 Cal.3d 838. In *Stuart* the petitioner complained he was denied a fair hearing because the attorney for the State Bar disclosed his prior disciplinary record to the hearing panel. We rejected the contention, pointing out that the improper disclosure was immediately objected to, the objection was sustained, and a member of the panel stated that the

panel would not consider the disclosure in deciding culpability. (Stuart v. State Bar, supra, 40 Cal.3d at p. 845.)

In the instant case, the objection to the admission of the hearing panel's decision was overruled. However, in its written opinion the hearing panel stated that it had considered the decision "only for the purpose of showing the following: Respondent was involved in [sic] excess of fifty lawsuits between December 1972 and the end of 1980; there had been claims of fraud made against him, and the date that Hearing Panel made its recommendation was July 19, 1985 [sic: 1982]." This ruling was proper.

The State Bar rules say nothing about the admissibility of the record in prior moral character proceedings. The admissibility of the record of prior disciplinary proceedings, however, is limited by rule 571 of the Rules of Procedure of the State Bar. Rule 571 states that normally such records are inadmissible until such time as the hearing panel is to determine the issue of appropriate discipline. However, an exception is provided if the record "tends to prove any fact in issue in the pending proceeding, other than the degree of discipline."

Assuming the moral character proceedings may be treated as being the functional equivalent of a disciplinary proceeding, they were not rendered inadmissible by rule 571, as they tended to prove several facts in issue in the pending proceeding. The State Bar was asserting that petitioner was required to disclose the accusations of fraud and the hearings into his character on his 1985 applications to take the bar examination. Such assertions could not be made unless it was established that petitioner had been the subject of claims of fraud and had

undergone hearings into his character. The State Bar also had the burden of demonstrating that petitioner had been barred from reapplying for admission to the bar for three years. Finally, to the extent that the incomplete copy of his 1979 application sent by petitioner provided evidence of the willfulness of his actions in filling out the 1985 application forms, it was necessary to show what had been omitted from the 1979 application form. Admission of the 1982 ruling on petitioner's character was an appropriate way to demonstrate all of these facts. The hearing panel's ruling suggests that it was considering the ruling only for these limited purposes, and not for the light it might shed on petitioner's character. No error appears.

IV. DENIAL OF DISCOVERY

Finally, petitioner claims the failure to grant him discovery of several items denied him a fair hearing. He notes that he sought, by subpoena duces tecum, to obtain a copy of a 27-page report prepared by James B. Tippin, Jr., Executive Director of the Committee of Bar Examiners, on the circumstances leading to petitioner's admission to practice law. The subpoena was quashed by the referee.

Petitioner contends that this report was significant in that it "concerns, in part at least, the inadequacy of the prior application forms to require a disclosure of prior moral character proceedings," as well as the "curative action" taken to amend the application forms. However, as previously stated, petitioner's claim that the application form called upon him to disclose the inquiry into his character stands or falls on the language of the form

itself, and subsequent changes to that form or even the beliefs of members of the committee concerning the adequacy of the form have little relevance to this determination.

The basic thrust of petitioner's argument is that the report would demonstrate that it was the negligence of members of the committee that led to his admission. However, as concluded by the hearing officer, any inadequacy on the part of the bar in failing to discover the hearings into petitioner's character does not absolve petitioner of his own failings in the matter. Assuming arguendo that the report would have revealed more clearly that the bar mishandled petitioner's application, such evidence would not alter our evaluation of petitioner's misconduct. Petitioner thus has not shown that the referee erred in quashing the subpoena.

For similar reasons, we must reject petitioner's claim that he was wrongfully denied discovery of confidential questionnaires concerning his moral character, submitted in 1985 by three attorneys whose names petitioner had provided as character references. Petitioner argues that these questionnaires might have placed the bar on notice that petitioner had been the subject of previous hearings into his moral character. However, even assuming the questionnaires contained such information, the State Bar's failure to note this does not relieve petitioner of responsibility for his own misconduct in the matter.

Finally, petitioner claims he was wrongfully denied discovery of a tape-recorded interview conducted by Executive Director Tippin with the State Bar's analyst

who conducted petitioner's moral character review. Petitioner had several telephone conversations with the analyst in 1985, which primarily concerned the three previously unresolved cases listed on petitioner's application form. Petitioner testified that in the course of these conversations he told the analyst he did not wish to go through "a moral character hearing" or "another moral character hearing." The analyst, who testified on behalf of the State Bar, had a generally hazy memory of the telephone conversations, and had no recollection that petitioner said anything about other moral character hearings. The tape-recorded interview which petitioner sought to discover apparently was part of an investigation by the State Bar to determine how it was that petitioner's prior history was not discovered.

A discovery referee, after listening to the tape recording in camera, denied the request for discovery on the ground that the tape recording was privileged under Evidence Code section 1040, subdivision (b)(2), and was additionally protected by the work-product privilege. Petitioner sought review of this ruling pursuant to rule 324 of the State Bar Rules of Procedure; the discovery review referee upheld the ruling on the former ground, but not the latter. Petitioner now vigorously argues that the privilege set forth in Evidence Code section 1040, subdivision (b)(2) did not apply, and in any event it was waived because the analyst was called as a witness, and a copy of the tape was given to him.

We need not address the propriety of applying Evidence Code section 1040, subdivision (b)(2) here, as petitioner has failed to show any prejudice resulting from failure to produce the tape. While petitioner claims the

tape would have assisted him in attacking the analyst's testimony, that testimony was given little weight. The hearing panel and review department, while specifically concluding that petitioner did not tell the analyst there had been a prior moral character hearing, also found that the analyst's memory was faulty. Moreover, to the extent that petitioner testified he informed the analyst of his prior moral character hearings, this testimony is highly equivocal. Petitioner was unsure whether he told the analyst he wanted to avoid "a" or "another" moral character hearing. Thus, even if the tape recording would have supported petitioner's account of his conversations with the analyst, our conclusion that petitioner committed acts of misconduct would remain unaltered.

DISPOSITION

The remaining question is what action this court should take in light of the foregoing conclusions. The State Bar suggests that we conduct an independent review of the record and order petitioner's immediate disbarment. We do not agree. The effect of petitioner's misdeeds was that he was able to prematurely apply for admission to the bar and to be admitted without adequate consideration of his moral character. There is no evidence that petitioner has committed any acts of misconduct since becoming a member of the bar. Under these circumstances, the most appropriate resolution of the matter is to withdraw from petitioner the benefits he wrongfully obtained.

We were confronted with a similar situation in State Bar v. Langert (1954) 43 Cal.2d 636. In *Langert*, we found

that an attorney had gained admission to the bar as a result of having made materially false statements on his application. Rather than disbarring him, we ordered his license cancelled and his name stricken from the roll of attorneys. The same remedy is appropriate here.

It is therefore ordered that Marc L. Goldstein's license to practice law in this state is hereby cancelled, and his name is ordered stricken from the roll of attorneys. This order shall be effective upon the finality of this decision.

GOLDSTEIN, MARC L. v. STATE BAR OF CALIFORNIA
S006541(BM 5081)

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The information provided here is not intended to reflect that which will appear in the official reports.

STATE BAR COURT
THE STATE BAR OF CALIFORNIA
REVIEW DEPARTMENT
(Filed MAR 07 1988)

I, Judy Duffield, hereby certify that I am Clerk of the State Bar Court, and that as such, I am the custodian of all records and files of the State Bar Court, and that the following is a full, true and correct copy of a resolution or resolutions adopted as the decision of the Review Department on February 25, 1988 insofar as it relates to the following proceeding:

86-0-66 LA – In the Matter of Marc L. Goldstein

Referee Kirkham stated that he was disqualified from participating in this matter and did not participate in the consideration or decision of this proceeding.

The following persons appeared before the Review Department in the above-entitled matter: Marc L. Goldstein, Respondent; David A. Clare, Counsel for Respondent; Arthur Margolis, Co-Counsel for Respondent; Thomas J. Kelley, State Bar Examiner. Virginia Peteraitis C.S.R., Court Reporter, was also present.

Mr. Kelley, Mr. Margolis and Mr. Clare each addressed the Review Department and each answered questions put to them by members of the Review Department.

The matter was taken under submission by the Review Department.

* * *

This matter previously having been submitted, after discussion and consideration of the matter by the Review

Department and upon motion made, seconded and adopted, it was

RESOLVED that the findings of fact and conclusions of the Hearing Panel of the State Bar Court as contained in its decision filed August 13, 1987, are hereby adopted as the findings of fact and conclusions of the Review Department as modified as follows:

1) hearing panel decision page 5, line 11 – the year "1983" should be changed to "1985";

2) the text of finding 12 should precede finding 11 (hearing panel decision, page 5);

3) finding 16 (hearing panel decision, page 6, lines 16-19) should read "On September 23, 1985, Respondent sent Rodriguez a letter with another copy of his September 14, 1985 letter (see Finding 15, above). (Exhibit D)";

4) hearing panel decision, page 8, line 15 – "specious" should replace "fallacious";

5) hearing panel decision, page 12, line – "disclosure" should replace "disclose";

6) hearing panel decision, page 12, line 11 beginning with the word "Respondent" and continuing through line 24 ending with the word "years." should be deleted and the following substituted:

> As an abstract proposition, it may or may not be reasonable for a respondent to assume the Committee of Bar Examiners maintained files of earlier applications, that the Committee would be aware of prior moral character proceedings, and that the Committee would be able to put that information together with any new applications that are received. Even if such an assumption were reasonable, it would not obviate a respondent's obligation to make full disclosure to the

Committee. *State Bar v. Langert*, 43 Cal.2d 636 (1954); *In re Wells*, 36 Cal.App. 785, 790 (Third Dist. 1918); *In re Lasley*, 61 Cal.App. 59, 60 (Second Dist. 1923); *In re Jacobsen*, 105 Cal.App. 236, 237 (Second Dist. 1930); *Greene v. Committee of Bar Examiners*, 4 Cal.3d 189 (1971); *Konigsberg v. State Bar*, 366 U.S. 36, 39 (1961).

Virtually all of Respondent's defense to this proceeding has focused on his claim that it was reasonable for him to assume that the Committee knew about all of the prior proceedings, and that when he indicated on the January 1985 application (Ex. 6) that he had previously applied in February, 1979, that should have satisfied whatever obligation of disclosure he had. However, it has already been found that Respondent was required to list the moral character proceedings as administrative proceedings on page 5 of his January 1985 applications because they had occurred since his "previous application." Moreover, in so arguing, Respondent ignores what followed. In April 1985, while processing Respondent's January, 1985 application, Ms. Connie Villalobos of the State Bar contacted him and asked him to send a copy of the 1979 application because it had been destroyed. Respondent claims now that in response he told her of the moral character proceeding. Perhaps the best evidence of what transpired, however, is Respondent's letter of April 22, 1985, in which Respondent states:

> I recently took the Spring 1985 General Bar Examination, and am enclosing a copy of my 1979 application. I was advised that my old application had been destroyed and you wish to have a copy of it for your records. (Exhibit 8).

No mention is made in the letter of the prior moral character proceedings. The letter is not

addressed to Ms. Villalobos although she had requested the copy.

Moreover, Respondent did not include with the copy of the 1979 application the so-called "attached sheets" which precipitated the earlier moral character proceedings. It is clear that Respondent had a duty to make full disclosure of the prior moral character proceeding, and that he intentionally did not make the necessary disclosures.

7) hearing panel decision page 14, lines 19 through 25 is deleted and the following substituted:

CONCLUSION

The Respondent, Marc L. Goldstein, committed misconduct which misled the Committee of Bar Examiners to certify Respondent for admission to practice without having undergone a full assessment of his moral character. That misconduct warrants discipline; and it is

FURTHER RESOLVED that the Review Department recommends to the Supreme Court that it issue an order vacating its December 10, 1985 order insofar as it admits Respondent to the practice of law in California. (*State Bar v. Langert*, (1954) 43 Cal.2d 636, 643); in the alternative, the Review Department recommends that the matter be re-referred to the State Bar for a determination of the appropriate discipline to be imposed, the Review Department intending in the event of said order to re-refer the matter to the same hearing panel.

Voting Yes: Referees Bowie, Boyle, Katsky, Mitchell, Reading, Thompson, Tilles, Vogt, Walenta, Young and Craig.
Not Voting: Referee Kirkham.

Dated: March 7, 1988 /s/ Judy Duffield
Judy Duffield, Clerk
of the State Bar Court

STATE BAR COURT
STATE BAR OF CALIFORNIA
HEARING DEPARTMENT-LOS ANGELES

In the Matter of: MARC L. GOLDSTEIN, A Member of the State Bar.	)))))	No. 86-0-66 LA (Bar Misc. 5081) FINDINGS OF FACT, CONCLUSION, and RECOMMENDATION.

DECISION

(Filed Aug. 13, 1987)

The above entitled matter came on regularly for hearing before this Hearing Panel on July 8 and 9, 1987, at the offices of The State Bar Court, 818 West Seventh Street, Suite 201, Los Angeles, California 90017. Present at the hearing were David E. Perrine, Esq., Principal Referee; Thomas J. Kelley, Esq., Examiner for the State Bar; Marc L. Goldstein, Esq. Respondent; and David A. Clare, Esq., Counsel for Respondent.

The hearing was reported by Marie L. Strickland, CSR 4645.

Oral testimony and documents consisting of Respondent's exhibits A through H, inclusive, and State Bar's exhibits 1 through 14, inclusive, were admitted into evidence.

The Hearing Panel makes the following Findings of Fact, Conclusion, and Recommendation:

FINDINGS OF FACT

This matter arises out of the Committee of Bar Examiners' (Committee) claim it erroneously certified respondent as qualified to practice law in California because Respondent misled it.

In making these Findings of Fact, this panel has considered Exhibit 1, the Finding of Fact and Recommendations of a Hearing Panel of the State Bar Court, only for the purpose of showing the following: Respondent was involved in excess of fifty lawsuits between December 1972 and the end of 1980; there had been claims of fraud made against him, and the date that Hearing Panel made its recommendation was July 19, 1985. This Panel furthermore strikes, sua sponte, all references in the Committee's post trial briefs, to previous findings as to Respondent's moral character, denies the Committee's Motion to Strike Portions of (Respondent's) Rebuttal Brief, and takes judicial notice of the 1987 basic form application.

1. The Respondent, Marc L. Goldstein, was admitted to the practice of law in the State of California on December 10, 1985, and is a member of the State Bar of California.

2. On or about March 12, 1986, the Supreme Court of the State of California filed an order which reads as follows:

Bar Misc. No. 5081

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

IN RE APPLICATION OF THE COMMITTEE
OF BAR EXAMINERS
(RE MARC L. GOLDSTEIN)

Motion to amend the order filed December 10, 1985, is DENIED without prejudice. The above entitled matter is referred to the State Bar for hearing, report and recommendation as to whether Marc L. Goldstein has committed misconduct warranting discipline. (See Stratmore v. State Bar (1975) 14 Ca1.3d 887, 890.)

3. On July 19, 1982, a Hearing Panel of the State Bar Court, made a recommendation that the Respondent not be certified for admission to the Bar of California. (Exhibit 1)

4. On November 23, 1982, James B. Tippin, Jr., Executive Director of the Committee, wrote to Respondent's counsel, Dana M. Cole, informing him, that after the hearing on November 19, 1982, the Committee had adopted the conclusion of the Hearing Panel that Respondent did not qualify for admission to practice law and that the Committee had established three years from the date of such denial as the period which must expire prior to the filing of another application. (Exhibit 2)

5. On January 19, 1983, the Committee issued its Findings and Conclusion and ordered that the period when another application could be filed extended to three years from the date it denied the application. (Exhibit 3)

6. On or about March 21, 1983, Respondent filed a Petition for Review with the Supreme Court seeking an order overturning the Committee's Findings (Exhibits 4 and 4a) and on May 23, 1984, the Supreme Court denied Respondent's petition. (Exhibit 5)

7. On June 8, 1983, Cole, in the form of a letter to Tippin, petitioned the Committee to review its decision and requested that Respondent be relieved of the obligation of retaking the bar exam. On July 8, 1983, Tippin responded to Cole's letter informing him the Committee had no authority to accept or consider the petition.

On July 20, 1983, Cole wrote to Robert M. Sweet, Assistant General Counsel for the State Bar, and Gloria Zank, Office of Trial Counsel, seeking a "stipulation or accommodation" for Respondent's admission to practice law. On July 25, 1983, Zank responded that the Office of Trial Counsel had no authority to enter into such an agreement. (Exhibit 22 of Exhibit H)

8. In January 1985, Respondent made several calls to the Committee's offices in Los Angeles. On one occasion he talked with Paula Daniels, an Assistant Section Chief of Receipts. Respondent testified that he informed her of the prohibition and she informed him he could take the spring 1985 exam. Daniels testified she has no recollection of the call but if she had received such a call it was her custom to refer the caller to her supervisor. This panel finds Respondent made no such disclosure.

9. By letter dated January 8, 1985, Respondent requested from the Committee an application. In this request Respondent referred to a conversation with Daniels, to having taken the 1979 exam, to the fact he had

been admitted in Kansas, and stated he should be sent the attorney repeater packet "in view of my situation." Respondent omitted the salient facts that he was under a prohibition from applying until November 1985 and that he had previously taken and passed the exam but had been rejected on moral character grounds. (Exhibit 9)

10. On January 16, 1983, Respondent sent to the Committee a short form application for the February 1985 bar examination, with a cover letter addressed to Ed Lopez. Lopez was in charge of delivering mail and obtaining supplies. The cover letter again only referred to his taking the 1979 exam, his admission in Kansas, and again omits the facts he had been previously denied admission to the California Bar on moral character grounds and that there was an order from the Committee that he could not apply until November 1985. (Exhibits 6 and 10)

11. Respondent failed the February 1985 exam. (Exhibit A)

12. On April 22, 1985, in response to a request from the Committee, Respondent sent it a copy of his 1979 application. (Exhibits 8 and 8a). The copy was never placed in Respondent's file with the Committee. On June 11, 1985, Respondent asked for a copy of his answers to bar examination he had just failed and study aids. (Exhibit B)

13. On June 12, 1985 Respondent filed a short form application to take the July 1985 bar examination, (Exhibit 7) an exam which he passed. (Exhibit E)

14. By letter dated September 9, 1985, Bernardo Rodriguez, an Analyst with the Committee who was processing Respondent's application, requested of Respondent further information concerning civil cases and administrative proceedings Respondent had shown on his application. (Exhibit C)

15. On September 14, 1985, Respondent sent Rodriguez a letter and an amendment to his application which contained additional information with regard to the matters he had disclosed in the Civil Cases, Administrative Hearings section of his application. (Exhibit 11)

16. On September 23, 1985, Respondent sent Rodriguez a letter with another copy of his 1979 application. Respondent did not include any of the additional sheets to which the application referred. (Exhibit D)

17. By letter dated September 28, 1985, Respondent furnished further information to Rodriguez concerning two lawsuits in which he had been involved. (Exhibit F)

18. Respondent testified he informed Rodriguez of the former moral character hearing. Although Rodriguez's memory is faulty, this panel finds that Respondent did not tell him there had been a prior moral character hearing.

19. Respondent, in sending Exhibits 9 and 10, intended to mislead the recipient into believing he was an attorney applicant whose only disability was having previously failed the exam.

20. Respondent intentionally suppressed all of the facts surrounding his moral character hearing, more than fifty litigation matters in which he had been involved, the

facts regarding fraud charges made against him, and the fact he had been prohibited from filing an application until November 1985.

DISCUSSION

There are two issues:

1. Did the Respondent commit misconduct warranting discipline in applying to take the bar examination prior to the expiration of the three year ban ordered by the Committee, and

2. Did the Respondent commit misconduct warranting discipline in the disclosures he made, or failed to make, in his application.

There is no issue as to whether the Committee, through its employees, was negligent. The negligence of the Committee's employees is relevant only to the extent they misled Respondent into believing his conduct was acceptable.

There is no question that Respondent applied to take the bar examination prior to the elapse of the three year prohibition ordered by the Committee. Although the actual date the prohibition expired was November 1985, the earliest date arguably possible was three years from the date the Hearing Panel made its recommendation, or July 1985. His applications were filed January 17, 1985, and June 12, 1985.

Having no factual basis for being able to deny his application was premature, Respondent claims he understood the order only limited his admission date, not the date he could apply to take the exam; Daniels had informed him he could take the spring 1985 exam; the

Committee did not object; and the Committee sent him admission tickets for the exam.

The order is not ambigious. It states, "Pursuant to Rule X, Section 104(a) the period when another application may be filed is extended to three years from the date of denial of the application." Respondent was an attorney, a member of the Kansas bar at the time he filed these applications, and for him to claim he misunderstood the order is fallacious.

Such a position is also at variance with the position he has previously taken. In his Petition to the Supreme Court for a Writ of Review, which he verified, he alleges that he would have to wait three years before reapplying for admission. (Exhibit 4, paragraphs 4, and 14(e)). His attorney, in letters to Zank and Tippin, refers to Respondent not being able to reapply until January 1986 and requests that he be allowed to reapply sooner. His brief in support of his Petition for Writ of Review is full of allegations of three years before filing another application. He refers to being required to take the examination again and undergoing another moral character hearing in 1986.

It is disingenuous for Respondent to claim Daniels approved of his taking the exam. One does not seek relief from the Committee's order from clerical personnel nor address communications to the Committee's mail room clerk. All prior communications seeking relief were with Tippin and Zank.

Respondent's claim that the Committee approved his taking of the exam by sending him tickets for admission and by not objecting to his taking the exam is faulty. It is

clear the Committee would not have sent the tickets and would have objected had Respondent made known the prohibition.

The Committee claims Respondent should have disclosed that he was under an order not to apply until November of 1985, on his applications at page 6, under the section entitled Professional Sanctions and Disciplines. This panel disagrees.

The words used are: "As a member . . . or as a holder of any license, or credential, have you:" These could be reasonably interpreted as requiring the meeting a two step test; (1) be a member or hold a license, etc., and (2) the agency to which the action was directed had authority to affect the membership or license. With regard questions a, b and c, neither criteria was met. Respondent was not a member of the State Bar of California, and whatever act it took had no effect on his Kansas license, (without action by the Kansas authorities). With regard to question d, the action by the Committee was not a disciplinary proceeding and was not for the holder of any license or credential. Registration as a law student did not make Respondent a member of the California bar or the holder of a license or credential.

The Committee and its employees are entitled to rely on the presumption that a person is acting lawfully. It would be ridiculous to require a statement on the application which would in effect say, "Has any order ever been made by any court or administrative body for you not to file an application until a certain date?" The user of a credit card is implicitly representing he has authority to

use it. One who presents a check is implicitly representing he is the person whom he appears to be and he has sufficient funds on deposit to cover the check. We do not expect those who accept credit cards and checks to demand a separate statement to that effect and the failure of such a person to demand such a statement does not relieve the presenter from liability. There is no reason why a higher standard should be placed on the Committee than on others. In dealing with those who seek admission to the California Bar the Committee has the right to expect compliance with its orders.

There are times in every attorney's life where he will be subject to court orders. An attorney is expected to comply or seek relief in the appropriate manner, not disobey and claim it was the court clerk's fault for allowing him to do what he was prohibited from doing. The fact the Committee may have been negligent in determining Respondent was violating its order does not relieve the Respondent from the duty of complying.

The Committee claims that Respondent's failure to disclose on his applications the fact he had been previously denied admission on moral character grounds, his extensive involvement in litigation, and the facts surrounding the fraud charges, deceived it into certifying Respondent for admission.

Respondent claims that in disclosing he had applied for the 1979 exam he made a sufficient disclosure because the Committee had an extensive file on him where all his litigation problems and the facts surrounding the fraud charges were revealed. Respondent further claims the Committee has admitted no such disclosure was required

because of the changes it made in the application form subsequent to his admission, and that he wasn't required to specifically make such a disclosure in his application because his name was well known to the Committee and its staff.

An applicant is entitled to interpret the facts in the light most favorable to himself as long as the disclosure is not misleading.

Respondent did omit on his application for the February 1985 exam, under the section entitled "Civil Cases, Administrative Hearings," the fact he was the subject of a moral character hearing, denied admission, and prohibited from applying for three years. The moral character hearing was an administrative hearing. The hearing did occur after he had filed (sic) his 1979 application. Therefore such a disclosure should have been made in that section of the application.

The fact the Committee may have changed the form does not indicate that such a disclosure was not required on previous forms. It only indicates that the Committee wants such information disclosed in a section other than the one where it most obviously should be made.

By disclosing the fact he had applied for the 1979 exam, can the Respondent be said to have made a sufficient disclose (sic) of his previous moral character, litigation and fraud problems?

Standing alone it may be that Respondent would be justified in expecting the Committee to maintain files and be aware of the previous moral character hearing. This

panel does not find it necessary to make that determination for when Rodriguez asked Respondent to supply a copy of his 1979 application, Respondent knew that the person processing his application was not aware of the prior moral character hearing, the extent of Respondent's litigation problems, nor the facts surrounding the fraud charges. There could be no other reason for the request for there were ten boxes of materials on Respondent and Rodriguez certainly didn't make the request just to add to the reams of material. At that point it is clear a duty arose in Respondent to make such disclosures and he did not.

Respondent has no right to rely on his notoriety as a defense to failing to make a complete disclosure. That argument is specious. The Committee need not be extra vigilant against claims made by the Respondent because of his reputation.

The Committee further contends that Respondent misled it by filing a short form rather than the basic application (long form). No evidence was presented that would indicate that it would not be reasonable for Respondent to assume he was a repeater, not an original applicant.

Furthermore this panel finds no appreciable difference between the long form and the short form except for the period of time each covers. If a correct short form is used in conjunction with a previously filed correct long form, the total period of time will be covered.

Respondent's actions evinces a course of conduct designed to gain his admission to the bar by keeping the review of his application at the lowest clerical levels; avoid detection by those who would have knowledge of

his prior hearing; avoid the moral character hearing he knew he would have to undergo; and to build a paper trail to estop the Committee should he be discovered.

To carry out the plan he violated the Committee's order, claimed approval for his acts from clerical personnel rather than the Committee itself, sent letters artfully drafted so as to make it appear he had made full disclosure, omitted critical information in his application and the clarifications he provided, misled the employees of the Committee, and lulled Rodriguez into a sense of false security by appearing to be cooperative, open and honest.

In *Calaway v. State Bar* (1986) 41 Ca1.3d 743, cited by Respondent, the petitioner omitted an ancillary proceeding to a lawsuit he had listed. In the instant matter Respondent omitted the majority of the lawsuits in which he had been involved, the fact he had undergone a moral character hearing, and the fact he had been prohibited from filing the application until November 1985 even after he knew the employee processing his application did not have that information. In *Calaway* there was no intent to mislead or to conceal derogatory information. In the instant matter there was.

It has been shown by convincing proof and to a reasonable certainty that Respondent gained admission to the California Bar by means of fraud and deceit. Respondent has not shown by any credible evidence that he was misled by the Committee's negligence.

CONCLUSION

The Respondent, Marc L. Goldstein, committed acts warranting discipline.

RECOMMENDATION

The Hearing Panel recommends to the Supreme Court that the matter be referred back to this Hearing Panel for a determination as to the level of discipline to be imposed.

DATED: Aug. 10, 1987

/s/ David E. Perrine
David E. Perrine
Compensated Referee

ORDER DENYING REHEARING

___ **No. S006541**

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

GOLDSTEIN

v.

STATE BAR OF CALIFORNIA

(Filed March 22, 1989)

Petitioner's Petition

Petitioner's petition for rehearing DENIED.

/s/ Lueas
Chief Justice

No. 89-112 (2)

In The

Supreme Court of the United States

October Term, 1989

MARC L. GOLDSTEIN,
Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

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23 P

QUESTION PRESENTED

Whether a Federal Constitutional issue is raised by the action of the Supreme Court of California in cancelling petitioner's license to practice law in California because of his fraudulent behavior in gaining admission to the California bar when petitioner was: (1) provided due process in that he had an adversarial hearing before the State Bar Court where he cross-examined the witnesses testifying against him and presented testimony on his own behalf, and his misconduct was proved; (2) provided a second hearing before the Review Department of the State Bar Court at which he presented written and oral argument after which the Review Department made unanimous findings of misconduct and a unanimous recommendation to cancel petitioner's license which finding and recommendation were forwarded to the California Supreme Court; (3) provided

independent review by the California Supreme Court which ordered petitioner's license to practice law cancelled, only after written briefing and oral argument, in a decision filed on January 26, 1989; and, (4) represented throughout every step by counsel in proceedings that were fair and provided petitioner complete due process.

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No. 89-112

In The
Supreme Court of the United States

October Term, 1989

MARC L. GOLDSTEIN,

Petitioner,

vs.

THE STATE BAR OF CALIFORNIA,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

Respondent the State Bar of California respectfully prays the Court to deny a writ of certiorari to review the judgement and decision of the California Supreme Court cancelling petitioner's right to practice law in California, filed January 26, 1989. That decision is reported as Goldstein v. State

Bar, 47 Cal.3d 937 (1989). (A copy of the opinion is included in petitioner's appendix to the petition for writ of certiorari [hereinafter "P. A."], P. A. at 1-21.)

JURISDICTION

Petitioner claims jurisdiction pursuant to the due process clause of the Fourteenth Amendment to the United States Constitution. We submit, however, that a due process claim cannot be established under the specific facts of this case where petitioner was given a panoply of pre-deprivation hearings before his license to practice law was cancelled.

STATEMENT OF THE CASE

The State Bar of California incorporates by reference the "Facts" as enunciated in the opinion below and set forth as follows:

FACTS

> In February 1979, petitioner took and passed the California bar examination. His certificate for admission, however, was delayed

pending a moral character investigation. In July 1982, following a lengthy hearing, a hearing panel of the State Bar Court recommended that petitioner's certificate for admission be denied on the ground that he did not possess the requisite moral character. This recommendation was based on findings that petitioner: (1) deliberately abused the judicial process by filing numerous actions to harass tradespeople and others with whom he had petty disputes and to obtain nuisance settlements to which he was not entitled; (2) knowingly made false statements under oath to advance his interests in the course of several of his lawsuits; (3) engaged on several occasions in the unauthorized practice of law; and (4) committed acts of fraud against various entities, including the filing of a false claim for reimbursement for "lost" money orders which were not in fact lost, making knowingly false statements on an application to practice law in Georgia, filing claims for lost baggage against several airlines which either falsely stated that the baggage was lost or greatly exaggerated the value of the items lost, making false statements on a credit application, and engaging in a check-kiting scheme.

On January 19, 1983, following a further hearing at which petitioner testified, the Committee of Bar Examiners adopted the findings of the hearing panel and denied

petitioner certification to practice law in the state of California. The committee further ruled that "[p]ursuant to Rule X, Section 104 (a) [of the Rules of the State Bar Regulating Admission to Practice Law in California] the period when another application may be filed is extended to three years from the date of denial of the application."[1] Petitioner unsuccessfully sought review of the ruling from this court, and, through counsel, made unsuccessful written attempts to obtain a waiver of the requirement that he retake the California bar examination.

By a letter dated January 8, 1985, only two years after the ruling of the Committee of Bar Examiners, petitioner made a written request for an application form to take the February 1985 bar examination. The letter followed a telephone conversation between petitioner and Paula Daniels, employed by the State Bar as an assistant section chief of receipts, the content of which is in dispute. At his request, petitioner

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[1] Although the committee did not make its formal written findings and conclusion until January 19, 1983, it heard the matter on November 19, 1982, and mailed petitioner notice of its intended decision four days later. It is unclear whether the three-year period established by the committee began in November 1982 or January 1983; however, the question does not affect the result in the instant proceeding.

was provided the "attorney-repeater" application packet, and applied for and took the February 1985 bar examination.[2] He failed that examination, and subsequently applied for and took the July 1985 examination. Neither his letter nor his application forms mentioned the hearings into his character or that he had previously been denied certification to practice law. The application forms did mention that he had previously applied to practice law in 1979, and furnished an update of the three cases to which petitioner was a party which had not been resolved at the time of his previous application.

Shortly after petitioner took the July 1985 bar examination, the State Bar requested from him further information regarding the three cases listed on his application, which he provided. In the course of providing this information, he had several telephone conversations with Admissions Analyst Bernado Rodriguez. The State Bar also requested a copy of his 1979 application to take the bar examination. Petitioner provided a copy of this application; however, the answers to two of the questions on the 1979 form (the questions dealing with accusations of fraud

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[2] Petitioner was an attorney licensed to practice law in Kansas, and was a "repeater" because he had previously taken the bar examination.

and civil litigation in which he had been involved) read, "see attached sheet [information is being compiled and will be mailed in shortly]." (Brackets in original.) The copy of the 1979 application provided by petitioner contained no "attached sheets", and the cover letter he attached made no mention of the inquiry into his character.

Petitioner passed the July 1985 bar examination. The State Bar failed to recognize that there had been previous hearings into his moral character, and routinely recommended that he be certified for admission. Following our order admitting him to practice on December 10, 1985, the State Bar discovered its oversight, and the instant proceedings commenced.

Petitioner contends the recommendation of the review department is unsupported by the evidence, that prejudicial evidence was improperly admitted against him at the hearing, and that the State Bar denied him discovery of relevant and exculpatory evidence. As will be seen, we find each of these claims unmeritorious. P.A. at 2-5.

REASONS WHY THE PETITION SHOULD BE DENIED

A. The California Supreme Court Fully Considered and Correctly Decided the Issues.

As best stated by the Supreme Court of California:

> [T]he effect of petitioner's misdeeds was that he was able to prematurely apply for admission to the bar and to be admitted without adequate consideration of his moral character. . . . Under these circumstances, the most appropriate resolution of the matter is to withdraw from petitioner the benefits he wrongfully obtained.
>
> We were confronted with a similar situation in State Bar v. Langert (1954) 43 Cal.2d 636 [276 P.2d 596]. In Langert, we found that an attorney had gained admission to the bar as a result of having made materially false statements on his application. Rather than disbarring him, we ordered his license cancelled and his name stricken from the roll of attorneys. The same remedy is appropriate here. P. A. 20 at 21.

Petitioner alleges the California Supreme Court was in no position to exercise its independent judgment concerning discipline since no record concerning

discipline had been made in the State Bar Court. Petition, p.12 n.9.

To the contrary, we submit that a strong record was presented to the California Supreme Court concerning petitioner's fraudulent conduct in gaining admission to the California bar. Because of that fraud the supreme court, when it cancelled petitioner's license to practice law, simply took from petitioner that which he had wrongfully obtained. Petitioner's misconduct was proved with evidence in full adversarial hearings before a Hearing Panel of the State Bar Court (single-member) whose findings (P. A. at 27-40) were adopted by eleven (11) referees of the Review Department of the State Bar Court (P. A. at 22-26),[3] after

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[3] Petitioner's appendix does not include a September 6, 1988, Review Department order which corrected several typographical errors, "nunc pro tunc", in its original order as follows: " 1) as to modification 5 [of the original order, P. A. (continued...)

briefing and oral argument. Finally, after further briefing and oral argument, the California Supreme Court adopted the recommendation of the State Bar Court. P.A. at 2.

At all times herein mentioned, petitioner was represented by counsel who engaged in extensive discovery and motion practice before the State Bar Court.

Moreover, proceedings before the State Bar of California ("State Bar") are adversary proceedings in which the State Bar has the burden of establishing misconduct by convincing proof and to a reasonable certainty. Franklin v. State Bar of California, 35 Cal.3d 274, 291 (1986). The

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[3](...continued)
at 23] inserts the number "8" after the phrase, "page 12, line"; and" [¶]" 2) as to modification 6), corrects the opening three lines of the description of the modification to read: "hearing panel decision, page 12, line 10 through line 23, should be deleted and the following substituted:""

California Supreme Court must decide independently whether the State Bar's findings are supported by the evidence and it will not consider the allegations proven unless sustained by clear and convincing evidence. Arden v. State Bar of California, 43 Cal.3d 713, 725 (1987).

Next, petitioner alleges the parties agreed to afford him a disciplinary hearing in the event of a finding of misconduct, and that "[t]he question of the appropriate discipline to be imposed was deliberately not discussed in the proceedings before the Hearing Panel or the Review Department of the State Bar Court". Petition, p.11.

Demonstrably, this contention is incorrect. There was discussion concerning petitioner's stipulation to discipline before the State Bar Court. Said stipulation however was never presented to the Office of Chief Trial Counsel nor to the State Bar

Court pursuant to rules 401-407 of the Rules of Procedure of the State Bar, because petitioner himself rejected it.[4] Compare Petition, p. 7-8, and p.11. It is clear that petitioner had notice that potential

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[4] Particularly, rule 407 deals with termination of formal proceedings by way of "STIPULATION AS TO FACTS AND DISPOSITION". The rule provides: "(a) If the stipulation as to facts and disposition is entered into at the investigation stage, the review department shall review the stipulation as provided for in rule 450(b)." [¶] "(b) If the stipulation as to facts and disposition is entered into at the formal hearing stage, the hearing panel or settlement conference referee shall examine into the facts or indicated facts, the fairness of the stipulation as to facts and as to disposition, and the effect of the stipulation upon the matters which are or may be client security fund matters or serious offenses. The hearing panel or settlement conference referee may order the approval of the proposed stipulation or its approval with modifications to the stipulation accepted by the parties. Thereafter, the review department shall review the order approving the stipulation as provided in rule 450(b)." Rule 450 (b) provides plenary authority to the review department to adopt, modify or decide the case on the record even when no satisfactory requests for review are filed regarding a hearing panel recommendation.

discipline was a matter at issue in his proceedings.

Further, all matters pertinent to any discipline issue were fully before the Supreme Court of California when it decided petitioner's case. Hence petitioner has no cause for complaint.

More importantly, however, the Supreme Court of California did not impose discipline in this matter. It cancelled petitioner's license to practice law because petitioner had obtained that license through fraud. See note 5 infra. Nevertheless, petitioner was given all the due process to which he was entitled under law. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542 (1985); Barry v. Barchi, 443 U.S. 52 (1979); Mathews v. Eldridge, 424 U.S 319, 348-49 (1976).

B. The Cases Relied On By Petitioner Do Not Support His Cause.

None of the federal cases petitioner cites even remotely suggest that an attorney

has been denied due process of law when given a full adversarial hearing in which to challenge any possible deprivation concerning his license. The California proceedings were fair and gave petitioner procedural due process, including notice and an opportunity to be heard. He cannot now be heard to complain. See, e.g., Fuentes v. Shevin, 407 U.S. 67 (1972); In Re Ruffalo, 390 U.S. 544 (1967); Selling v. Radford, 243 U.S. 46, 51-52 (1917).

Additionally, the state court decisions petitioner cites do little to advance his cause. Petitioner was given a hearing and the identical procedural safeguards appropriate to his matter that apply to all State Bar disciplinary hearings on the merits.[5] To the extent that matters possibly

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[5] This is so even though petitioner's was not strictly a disciplinary hearing, but a hybrid moral character matter to determine whether petitioner had gained admission to (continued...)

mitigating petitioner's misconduct were not introduced or argued, petitioner himself is to blame. Petitioner, as does the State Bar, must live with the record created below. Thus the decisions cited by petitioner in support of his due process claim are entirely inapposite. See Petition, p. 15-16.

Lastly, State Bar of California attorney misconduct proceedings have consistently

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[5](...continued)
the California bar through fraud. And, if so, whether he should be disciplined or have his license to practice cancelled because it was obtained fraudulently. At oral argument before the California Supreme Court, State Bar counsel sought disbarment as discipline for petitioner's misconduct. The court expressly rejected this argument as follows: "We do not agree. The effect of petitioner's misdeeds was that he was able to prematurely apply for admission to the bar and to be admitted without adequate consideration of his moral character. There is no evidence that petitioner has committed any acts of misconduct since becoming a member of the bar. Under these circumstances, the most appropriate resolution of the matter is to withdraw from petitioner the benefits he wrongfully obtained." P. A. at 20. Hence petitioner has never been truly "disciplined" for any misconduct, but only made to forfeit what he fraudulently obtained.

survived constitutional due process scrutiny by the California Supreme Court. See, e.g., Van Sloten v. State Bar, 48 Cal.3d 921, 928 (1989); In Re Utz, 48 Cal.3d 468, 477-78 (1989); Rosenthal v. State Bar, 43 Cal.3d 612, 634 (1987); Martin v. State Bar, 20 Cal.3d 717, 722-23 (1978).

In Van Sloten, supra, the court held:

> We have long recognized the regulatory ability of the State Bar, and have found that the procedural safeguards provided by the Rules of Procedure of the State Bar are adequate to insure that administrative due process will be observed. 48 Cal.3d at 928.

In Martin, supra, the court held:

> Petitioner has a "duty to present to the [hearing and review panels] any evidence which he deemed favorable to himself. He may not neglect to do this and rightly demand in his petition for review either that such evidence should be considered by this court or that he is entitled to another hearing before the State Bar." 20 Cal.3d at 722-23, citing Coviello v. State Bar 45 Cal.2d 57, 65 (1955).

Likewise here, petitioner cannot claim any constitutional due process violation for something he simply failed to do.

CONCLUSION

Petitioner was accorded a full evidentiary hearing concerning allegations of his misconduct in fraudulently gaining admission as an attorney to the California bar. After intense litigation over a three (3) year period, the evidence against petitioner was found to be compelling. Therefore the California Supreme Court ordered that petitioner forfeit that which he had wrongfully obtained through fraud and deceit. Petitioner's due process challenge to that order fails under prevailing constitutional standards because petitioner had ample notice, and a fair hearing in adversary proceedings challenging his certification to practice law in California as fraudulently obtained. State Bar of

California attorney misconduct proceedings have consistently survived constitutional due process scrutiny by the California Supreme Court where petitioner's and like matters are subject to independent review before any legal rights are effected.

For all the foregoing reasons the petition for writ of certiorari should be denied.

DATED: August 21, 1989.

Respectfully submitted,

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BY: _____
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No. 89-112

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1989

MARC L. GOLDSTEIN,
Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the
California Supreme Court

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ASSOCIATION OF BAR DEFENSE COUNSEL IN SUPPORT OF PETITIONER MARC L. GOLDSTEIN

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No. 89-112

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1989

MARC L. GOLDSTEIN,
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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE OF ASSOCIATION OF BAR DEFENSE COUNSEL IN SUPPORT OF PETITIONER MARC L. GOLDSTEIN

This motion of the Association of Bar Defense Counsel (ABDC) for leave to file the annexed brief amicus curiae is respectfully submitted pursuant to Supreme Court Rule 36. Consent to the filing of this brief has been granted by counsel for petitioner, which has been lodged with the Clerk of this Court. Consent has been withheld by counsel for respondent, the State Bar of California. ABDC is a non-profit California corporation newly formed in the public interest,

comprised of attorneys who represent and defend persons in disciplinary and admission proceedings brought before the State Bar, and involved in matters of broad scope and importance for the betterment of the Bar and the public.

Amicus believes that its litigation experience and knowledge of these disciplinary proceedings will provide an additional viewpoint and insight with respect to the important constitutional issues involved in this case. The California Supreme Court did not set out reasons justifying its failure to accord petitioner a hearing on the issue of the extent of discipline to be imposed, nor for allowing the State Bar to have precluded petitioner from access to relevant exculpatory evidence contained within State Bar files.

The opinion below established a dangerous precedent violative of due process, namely that harsh punishment may be summarily imposed without affording the accused a proper hearing. The right to a fair and impartial hearing is an essential cornerstone of American jurisprudence, especially true in attorney disciplinary proceedings, where the public expects such proceedings to closely conform to standards of due process. In this case, the California Supreme Court imposed the Draconian penalty of stripping petitioner of his license to practice law because it concluded that petitioner did not properly bring to the State Bar's attention its own records and files which were maintained on petitioner. The punishment imposed bore absolutely no relationship to evidence in the file, and was grossly excessive as compared to

punishment imposed on other California attorneys.

Simply stated, the California Supreme Court was not in a position to decide the appropriateness of the ultimate sanction of license revocation, which it did without according petitioner the benefit of a hearing on the issue of discipline, and without discovery on all issues.

For the foregoing reasons, the Association of Bar Defense Counsel requests that this motion for leave to file the annexed brief amicus curiae be granted.

DATED: August 22, 1989

Respectfully submitted,

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No. 89-112

In The

SUPREME COURT OF THE UNITED STATES
October Term, 1989

MARC L. GOLDSTEIN,
Petitioner,

v.

STATE BAR OF CALIFORNIA,
Respondent.

On Petition for Writ of Certiorari to the
California Supreme Court

BRIEF AMICUS CURIAE OF ASSOCIATION OF BAR DEFENSE COUNSEL IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

The interests of amicus are set forth in the preceding motion for leave to file brief amicus curiae of the Association of Bar Defense Counsel.

STATEMENT OF THE CASE

After applying to take the California bar examination on two occasions in 1985, and after successfully passing the bar and gaining admission to the State Bar, petitioner questioned the State Bar's assertion that he had somehow deluded the Bar into allowing him to take the bar examination, and more importantly, had deluded the State Bar into admitting him to practice law.

Petitioner disputed the Bar's contention that he had failed to fully and honestly answer all questions asked of him on the bar applications; especially since the State Bar at all times was in possession of extensive records on petitioner from the 1980 moral character proceedings.

In applying to sit for the bar examinations, petitioner filed the applications in his true name, used his correct address, disclosed his true date of birth and social security number, provided a picture of himself and a complete set of fingerprints, listed three attorneys as character witnesses who each had participated in the prior moral character proceedings, disclosed his having taken the 1979 bar examination (which resulted in the earlier hearings), and discussed the prior moral character hearings with employees in the moral character section of the Bar before being admitted. Despite the fact that petitioner had engaged in the filing of numerous lawsuits in his youth, his record as an attorney was unblemished. He was admitted to the Kansas Bar in 1981, and the California Bar in 1985, and never had a single complaint or allegation of misconduct raised against him. The court below noted in its opinion that "there is no evidence that

petitioner had committed any acts of misconduct since becoming a member of the bar." (47 Cal. 3d 937, at 951). Furthermore, there would have been nothing for petitioner to conceal from the State Bar since they admittedly had all of his records in their possession, both in paper form and in their computer.

The State Bar Examiner filed charges against petitioner and thereafter proposed a settlement[1]. Petitioner refused the offer stating that he had done nothing wrong, to which the State Bar attorney indicated that he would thereafter seek harsh punishment.

The record shows that the person at the State Bar charged with checking on petitioner's 1985 applications knew from his computer screen exactly who petitioner was, based on the unique information he truthfully listed on his applications. The evidence was overwhelming that the State Bar knew petitioner's entire past record from the proceedings which it had convened (in fact, as a matter of law it is conclusively presumed to know its own records). Petitioner could not have anticipated nor foreseen the numerous mistakes which the State Bar claims it made in processing petitioner's applications, a fact which the State Bar conceded. The State Bar also admitted in its brief to the California Supreme Court and in oral argument before the court below that it had been negligent in the handling of petitioner's applications.

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[1] The settlement proposal contained a recital, which if petitioner would accept a one-year probation (during which he would still be allowed to practice), the State Bar would agree in writing that it "had examined the applications of Mr. Goldstein and there are no objections thereto and the State Bar has no further criticism of the application procedure followed by Mr. Goldstein."

In March of 1986, the California Supreme Court ordered the State Bar to conduct an investigation on the issue of "whether [petitioner] had committed misconduct warranting discipline". Due to the wording of the order, neither the State Bar nor petitioner presented any evidence on the issue of the extent of discipline, having decided to reserve those issues for a second hearing. The State Bar and petitioner stipulated that if there was a finding of misconduct, and if the finding was sustained on appeal, *further hearings would be held to determine the appropriate level of discipline, if any.* Essential to petitioner's due process arguments herein is that the referee likewise made no findings or conclusions as to the appropriate discipline, instead recommending that the matter "be re-referred back" for further hearings before the same referee to determine the appropriate punishment.

When the proceedings below were returned to the California Supreme Court, the court ignored the written stipulation, and for some reason which is not stated in the opinion, did not refer the matter back for further administrative proceedings, but rather imposed the harshest sanction available against petitioner -- without affording him a hearing that he and the State Bar Examiner had agreed to, and to which he had a fundamental constitutional right to receive.

The court below concluded that petitioner failed to bring to the attention of the State Bar the facts contained in their own records and files, and that he had applied months too early to sit for the bar, and thereby was able to improperly secure admission to the Bar. Kafkaesque? Yes! Unconstitutional? Yes!

Even conceding the accuracy of the finding of facts, petitioner was nevertheless entitled to due process of law which, at a minimum, required the right to a hearing, before any discipline was imposed. The sanction of license revocation was, in and of itself, unduly harsh in comparison to treatment accorded to other attorneys subjected to discipline, and should not have been imposed absent a full hearing.

I
SUMMARILY REVOKING A LICENSE TO PRACTICE LAW WITHOUT AFFORDING AN OPPORTUNITY TO BE HEARD IS OFFENSIVE TO THE CONSTITUTION AND HAS NATIONWIDE IMPLICATIONS TO OUR LEGAL SYSTEM.

A person's license to practice law is a valuable property right, and something which should be taken away only when justice and protection of the public requires -- and then only in strict conformity with notions of Due Process and Equal Protection. *In Re Ruffalo*, 390 U.S. 551 (1968). This Court has consistently held that due process must be accorded in the field of professional licensing, even to persons who are merely attempting to obtain licensure to the state bar. *Willner v. Committee on Character and Fitness* 373 U.S. 96, 102-05 (1963). Attorney disciplinary proceedings are "adversary proceedings of a quasi-criminal nature" where procedural due process must be afforded. *In Re Ruffalo*, *supra*, 390 U.S. 551.

A dangerous precedent is established when the highest court of a state summarily cancels a professional license, without according the accused a hearing mandated by the

Due Process Clause of the Fourteenth Amendment to the United States Constitution. As the petition for certiorari pointed out, this is analogous to a court dispensing with the entire penalty phase of a trial upon a finding of guilt against the accused. Once there was a finding of misconduct, the court below dispensed with the requisite formality of a hearing as to the appropriate sanction to be imposed, and summarily imposed the ultimate punishment which was wholly disproportionate to any evidence in the record.

This was especially true in this case given the finding by the court below that there is *"no evidence in the record that petitioner has committed any misconduct since becoming a member of the bar."* (47 Cal.3d 937, 951.) In virtually every other disciplinary case, an attorney accused of wrongdoing is entitled to the due process guarantee of a hearing, and is entitled to bring forth witnesses and evidence on his behalf bearing on the appropriateness of discipline. Regrettably, petitioner was given no such opportunity here.

The fact that petitioner was vigorously prosecuted after rejecting the State Bar examiner's settlement offer (due to his refusal to admit wrongdoing) suggests that the prosecution of this case by the State Bar may not have been entirely impartial.

The State Bar initially claimed that petitioner was admitted to the Bar due to negligence of its own staff; but later alleged that petitioner had mislead the Bar by failing to disclose to the Bar his involvement in its own moral character proceedings. In defending himself against these charges, petitioner took the position that he did nothing wrong, and

that the Bar at all times knew who he was and was not at all mislead by him. Furthermore, petitioner asserted that there was no way he could have known or anticipated the numerous errors that would have been committed by the State Bar. The Bar's own conduct was therefore directly in issue, suggesting the need for a neutral and detached special prosecutor rather than having this case prosecuted by a person who was personally involved, who had given testimony in the proceeding, and who was responsible for overseeing the admittedly negligent staff of the State Bar. See *Pickering v. Board of Education*, 391 U.S. 563, at 578 (1968).

Recently this Court reversed an attorney's six month suspension from practice, summarily imposed by a judge, when the attorney refused to apologize for a letter he had written to the court. *In the Matter of Attorney Robert J. Snyder,* 472 U.S. 634 (1985). Amicus strongly urges the granting of certiorari in this case based on many of the same factors presented here.

The thrust of the State Bar's case was that the application forms which petitioner completed reasonably called for disclosure of the prior moral character proceedings. The court below concluded that petitioner committed misconduct by failing to make such disclosures, however it did so concluding that the negligence of the State Bar was irrelevant. This holding deprived petitioner of his license without due process.

Petitioner had absolutely no notice that he could be punished, let alone lose the license to practice law he had waited

years to receive, just for failing to disclose something fully known to the State Bar, which was not asked of him on the applications he was sent.[2] A person intending to conceal facts from the State Bar would not have gone about it by providing accurate information to the same entity that was very familiar with him, maintained computer files on every applicant, and was in possession of hearing transcripts and extensive documentary evidence on petitioner. Petitioner did not have to conceal anything from the State Bar since they not only knew everything about him, but there was no new adverse information about him which, if discovered by the Bar, might have prevented him from admission.

Amicus has been unable to find a single case where an attorney had his license revoked for failing to disclose matters on a bar application which were previously disclosed, and which were admittedly in the possession of the State Bar at all times. The facts of the instant case are dramatically different from those in *Langert v. State Bar*, 43 Cal.2d 636 (1954), cited by the court below in its opinion in *Goldstein v. State Bar*, 47 Cal.3d 937 (1989), yet the outcome in both was identical. Langert had failed to list on his California bar application the fact that he was a member of a bar of another state, that a disbarment recommendation in that state was pending along with five other disciplinary proceedings, he provided false former addresses, all in an effort to prevent discovery by the California Bar of adverse facts which would have prevented Langert from admission.

In the case at bar, there was nothing that petitioner was

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[2] The application form was rewritten in 1986 to include such a question, for the first time, following petitioner's admission to the Bar.

trying to keep the State Bar from "discovering" about him, since they concede that they knew everything about him and had everything in their files; accordingly due process and equal protection mandate that petitioner not be penalized by forfeiture of his license for complying with the instructions on the applications sent to him by the State Bar directing him to list only new incidents.

The absence of "any evidence . . . of misconduct since becoming a member of the bar" would certainly have been a factor in mitigation at a hearing to determine the appropriate sanction, yet no such hearing was afforded in this case.

II
DUE PROCESS REQUIRES THAT PERSONS ACCUSED OF WRONGDOING BE ALLOWED ACCESS TO EXCULPATORY EVIDENCE IN THE POSSESSION OF THE PROSECUTOR.

The court below, in a departure from well-established precedent rooted in the Constitution, approved of the State Bar's withholding of relevant and exculpatory evidence from petitioner under a assortment of claimed evidentiary privileges. These included claims of work product, attorney/client, and most importantly, the official information privileges. The items withheld included such basic evidence as witness statements, a 27 page report to the Committee of Bar Examiners dealing with the State Bar's findings and conclusions about how petitioner was admitted to the Bar, handwritten notes of telephone conversations which petitioner had with the State Bar's staff prior to his admission, etc. The court below found that petitioner had failed to show

how he was prejudiced -- shifting the burden of proof in total contravention of well-settled law which compels either dismissal or a preclusion or limiting order where the prosecuting agency asserts the official information privilege. See, for example, *In Re Ricky B.*, 82 Cal.App.3d 106 (1978); *Shepherd v. Superior Court*, 17 Cal.3d 107 (1976); *Dell M. v. Superior Court*, 70 Cal.App.3d 782 (1977); *People v. Ansbro*, 153 Cal.App.3d 273 (1984). *California Evidence Code* Section 1042, applicable to criminal cases, states that upon assertion of a claim or privilege by a governmental agency, "the presiding officer *shall make an order* or finding of fact adverse to the public entity. . . " The words of the statute are mandatory, not permissive.

The United States Supreme Court considered this issue in *United States v. Reynolds* 345 U.S. 1 (1953), and held:

> "[S]ince the government which prosecutes an accused also has the duty to see that justice is done, *it is unconscionable to allow it to undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense.*"
>
> (*emphasis added.*)

The evidence withheld from petitioner by the State Bar prosecutors was crucially relevant, especially since the Bar's case turned in large part on its claim that petitioner had mislead the Bar into admitting him by concealing his involvement in the earlier moral character hearings. If petitioner was able to prove that he had made adequate disclosures verbally to the State Bar staff, or that the State Bar was fully aware of petitioner's records, then those factors would

strongly militate against a finding of misconduct, or at least, would be substantial factors in mitigation in any penalty to be determined.

The ruling in the case below has a far-reaching impact not only on attorneys in California, but to persons involved in any administrative or licensure disciplinary proceedings as well as the public in general. The fundamental right to a fair trial, to confront and cross-examine witnesses and evidence, to be able to call witnesses and compel evidence in one's own defense, is undermined by the decision below, especially important in those cases deal with one's right to pursue one's livelihood. *In Re Murchison*, 349 U.S. 133, 136 (1955). The potential impact and scope of the decision of the court below, therefore applies to administrative agencies as well as to the courts. *Gibson v. Berryhill* 411 U.S. 564, 579 (1973).

In the case at bar, petitioner was permitted to confront and utilize only that evidence which the State Bar released to him; resulting in the State Bar controlling not only the charges and conduct of the trial, but also controlling and limiting the manner in which petitioner could prepare and provide for a defense to the charges of misconduct.

III
THE SANCTION OF LICENSE REVOCATION WAS UNDULY HARSH UNDER THE CIRCUMSTANCES.

The California Supreme Court was not in a position to independently evaluate the record below, because there was

no record made on the subject of discipline. Petitioner was never given an opportunity to present evidence and argue the issue of sanctions since the court below did not refer the matter for a penalty hearing, despite the written stipulation entered into between the State Bar and petitioner.

Assuming *arguendo* that the finding of misconduct was fully warranted, the punishment imposed was unduly harsh. Petitioner had overcome his youthful shortcomings of 10-15 years earlier and had subsequently established an excellent record of conduct and good moral character, and was eager and intent on becoming a lawyer. Although he had passed the Bar in 1979, he was forced to wait for nearly six years, resulting in his having to again pass the bar in 1985.[3] He wrote asking for permission to take the Bar, which he reasonably and justifiably believed had been granted. He had received an application; which the Bar accepted; and then allowed him to take the Bar. After his first unsuccessful attempt in February, 1985, he again applied and was allowed to retake it in July, 1985, and was admitted in December 1985, some six and a half years after first passing the California Bar.

The punishment imposed upon petitioner was clearly excessive when compared with the other cases in which the State Bar has sought license revocation. When the court below asked the State Bar to conduct an investigation in the case at bar, it cited as authority the case of *Stratmore v. State*

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[3] The State Bar has again required petitioner to pass the bar examination an unprecedented third time in 1989, even though he has already passed it twice in 1979 and in 1985. Petitioner was allowed to take the July, 1989 bar examination and is now awaiting results.

Bar, 14 Cal.3d 887 (1975), in which a nine-month suspension was imposed due to pre-admission misconduct which consisted of having defrauded nearly a dozen lawfirms. There is no question that such misconduct is much more egregrious than that found in the case at bar, yet the discipline imposed in *Stratmore* was dramatically less.

No sanction was imposed in other California revocation proceedings where the attorneys had failed to disclose information *specifically called for* on the bar application. In one case, an applicant had deliberately concealed the fact that he had testified falsely under oath *March v. Committee of Bar Examiners*, 67 Cal.2d 718 (1967). In another case, an applicant had concealed the fact that he had been a party to an out-of-state disbarment proceeding *In Re Rollinson*, 213 Cal. 36 (1931). A disbarred attorney was granted reinstatement even though he had concealed on his bar application a judgment for fraud against him, brought by his insurance company, on the grounds that he had falsified his application for insurance. *Calaway v. State Bar,* 41 Cal.3d 743 (1986). The California Supreme Court specifically reasoned that since the State Bar could have discovered the fraud judgment, Calaway's "assumption was not unreasonable that the bar would review the entire file if it deemed the matter significant." *Calaway, supra,* 41 Cal.3d at 748.

The California Supreme Court has summarily dismissed three other petitions brought by the State Bar seeking to revoke licenses to practice law (See California Supreme Court Bar Misc. Nos. 4128 and 4024) based on the Bar's claim that it had been negligent in admitting: (a) a former New York judge who had been recently disbarred, (b) and

applicant who had failed the Professional Responsibility Examination, and (c) an applicant who had never taken the Professional Responsibility Examination.

Petitioner did not steal money from a client, engage in contemptuous acts, or otherwise commit a heinous act of dishonesty, yet attorneys who have engaged in such conduct have received much less punishment than that imposed on petitioner. In the recent case of *In Re Mostman*, 47 Cal.3d 725 (1989), an attorney who solicited the murder of a former client received a five-year probation, with only two years' actual suspension -- despite the fact that he had been disciplined twice before.

An attorney who was convicted of possession of LSD for sale received a one year actual suspension and five years' probation. *In Re Nadrich*, 44 Cal.3d 271 (1988). An attorney who was convicted of illegal possession of marijuana and conspiracy to distribute received no actual suspension and was placed on probation for three years. *In Re Kreamer*, 14 Cal.3d 524 (1975).

An attorney who committed multiple acts of willful misconduct, abandoning clients to their prejudice, obtaining substantial loans under unfair terms and pursuant to misrepresentations, and ultimately losing the money without making any repayment was placed on five years' probation with eighteen months actual suspension. *Frazer v. State Bar*, 43 Cal.3d 564 (1987).

In the case of *State Bar v. Boehme*, 47 Cal.3d 448 (1988), an attorney was suspended for eighteen months for having misappropriated client trust funds, for failing to make restitu-

tion, and for having fabricated and misrepresented facts to the Review Department of the State Bar Court during the disciplinary case. An attorney who wilfully disobeyed important court orders and attempted to deliberately mislead a judicial officer, and who lied on several occasions during his disciplinary proceedings was placed on five years' probation with only one year actual suspension. *Maltaman v. State Bar* 43 Cal.3d 924 (1987).

The court below has repeatedly expressed the view that the primary purpose of discipline is the protection of the public, the profession, and the courts rather than the punishment of the attorney. *In Re Severo,* 41 Cal.3d 493, 500 (1986). Yet, in the case at bar, the court has expressly held that there was no evidence that petitioner committed *any acts of misconduct* as a member of the bar, suggesting that the public need not be "protected" from petitioner. It is uncontroverted that none of petitioner's alleged acts of misconduct even begin to rise to the level of these recent cases, yet the sanction that petitioner received was much more severe than any of them. The fact that the State Bar examiner had proposed a one year probation with no actual suspension in settlement of this case indicates that even the State Bar prosecutor did not see the instant case as one calling for the imposition of the ultimate sanction.

CONCLUSION

Amicus believe that the ruling of the California Supreme Court was clearly erroneous and poses a serious threat to the integrity of the attorney disciplinary system, which in this case, denied an officer of the court the fundamental right to a hearing guaranteed by the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The ramifications of the decision below have nationwide application, because it is not confined to the context of attorneys, but affects the disciplinary process for all professions in all states.

Beyond the threshold question of the right to a hearing, there is very compelling evidence in the record below that petitioner's license revocation was excessive and wholly disproportionate to any acts of misconduct by petitioner.

For the foregoing reasons, amicus respectfully requests that this Honorable Court issue its writ of certiorari to the California Supreme Court in the matter of *Goldstein v. State Bar of California.*

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Respectfully submitted,

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